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No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company,

Appellant,

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLANT.

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Appellees.

BRIEF FOR APPELLANT.

INTRODUCTION.

The appellant was the plaintiff in the trial court, and the appellees were defendants. Hence the parties before this court are in the same relative positions as they were in the court below.

This case is extraordinary in the size of the record. There are 3448 printed pages, more than 200 exhibits, and 134 assignments of error.

This case is also extraordinary in that a court of equity which abhors forfeitures has inflicted a large forfeiture and penalty upon appellant. By the imposition of the forfeiture herein, appellant is by a decree in equity deprived not only of his purse, but also of his good name.

The case is likewise extraordinary in the lengthy memorandum opinion of the trial court, which it adopted as its findings of fact and conclusions of law. The opinion seemingly partakes of the bitterness of appellees toward appellant. It is argumentative. It goes beyond the bounds of the judicial necessities of the case, and no opportunity is omitted to reflect unfavorably upon appellant.

The size of the record and the argumentative nature of the opinion of the trial court has rendered the task of writing the brief of appellant of more than usual difficulty. These same facts likewise add tremendously to the burden of this court in considering the appeal.

The attorney for appellant has endeavored to comply with the suggestion of the court, made on motion for extension of time, to the effect that the brief should be condensed as much as possible. A sincere effort has been made in that behalf.

STATEMENT OF THE CASE.

Appellant sustained a fire loss which was insured against by appellees. The amount of appellant's loss was disputed. Appellant at first claimed a loss of $73,601.96, and later increased his claim to $106,-992.83. The appellees at first admitted the loss was $22,733.18, and later by their answers in this case admitted, in effect, that the loss was $35,000.00.

Because several insurance companies were involved, and some denied liability, the loss had to be apportioned, and appellant brought this action in equity to ascertain and apportion the liability of the several appellee companies upon the fire loss sustained. However, what the total amount of the loss was, or how it should have been apportioned, was not determined, for the trial court decreed that appellant had forfeited his entire claim and denied him any relief whatsoever.

The fire in question occurred in appellant's factory at 243 Sacramento Street, San Francisco, on October 19, 1929. It caused loss and damage to appellant's stock of merchandise, which consisted of manufactured bags and cotton liners, bags in process of manufacture, and materials to be used in manufacture.

The policies in suit all cover damage to stock, and are in the total sum of $185,000.00. Five policies which total $50,000.00 are combination of specific and excess insurance. One policy by Western Insurance Company is for $50,000.00 and is to attach when values are in excess of $50,000.00; the last group consists of two cover notes written by appellee Na-

tional Liberty Insurance Company for $85,000.00, which call for policies according to the standard California statutory form, but which said appellee, by a cross-complaint asks to have reformed into excess policies to attach when values exceed $100,000.00.

All appellees plead certain special defenses which may be grouped under two heads: first, that appellant swore falsely in his proof of loss that the fire which caused the damage "originated from causes unknown to this assured" when he "at all said times knew that said fire was of incendiary origin"; and second, that appellant in his sworn proof of loss claimed his loss was $73,601.96, whereas the loss sustained by appellant "did not exceed the sum of $35,000.00, which fact the plaintiff (appellant) well knew at the time of preparing and verifying said purported proof of loss."

The appellee companies writing the first $50,000.00 of insurance plead the additional defense that an appraisement of the loss was not had under the terms of the policy due to the acts of the plaintiff, and the appraiser appointed by him. The Western Insurance Company of America plead an additional defense that its policy was for damage in excess of $50,000.00, and that the loss was less than that amount. The National Liberty Insurance Company plead also that it was only liable if values were in excess of $100,000.00.

Without making definite findings of fact upon the issues made by the pleadings, the honorable trial court wrote a memorandum opinion which it adopted

as its findings of fact and conclusions of law, and ordered judgment for appellees.

The appellant filed a petition for rehearing which was denied. Thereafter he appealed and now presents his appeal for consideration by this Court.

QUESTIONS ON APPEAL.

The questions involved on this appeal are:

(a) Can it equitably be held in this case that appellant has forfeited his right to recover from appellees the loss sustained by him, to-wit, the sum of $35,000.00 as admitted by appellees, or a larger sum as claimed by appellant?

(b) Is the memorandum opinion of the trial court adopted as its findings of fact and conclusions of law a compliance with Equity Rule 70½ requiring the facts to be found specially?

(c) Is appellant's right to recover his loss from certain appellees defeated by the failure of an appraisement prior to the commencement of this action?

(d) If appellant is entitled to recover, what is the amount he should recover and how should it be apportioned among appellees?

The determination of these questions depends upon whether or not the trial court committed error in reference to matters specified in the assignments of error in this case.

THE ERRORS RELIED UPON.

Appellant makes the following statement of the substance of the errors relied upon:

First. The trial court erred in denying plaintiff's motion for special findings.

(Assignment of Error CXXV, V. VI, p. 3421; V. I, p. 203; V. VI, p. 3380.)

Second. The trial court erred in finding that plaintiff was guilty of fraud and false swearing in his proofs of loss and that there was overvaluation which resulted from an intentionally fraudulent attempt to get an excessive award from defendant insurance companies; furthermore any defense of false swearing was waived.

(Assignment of Error XC, V. VI, p. 3412, and Assignment of Error LXXXIX, p. 3412.)

Third. The court erred in holding that the heart of plaintiff's contention is that large quantities of goods were burned out of sight and that unless large quantities were burned out of sight plaintiff's claims are so excessive as to be false and fraudulent.

(Assignment of Error XCII, V. VI, p. 3413.)

Fourth. The court erred in finding that plaintiff knew what was in his factory and that his claim of loss was overvalued and that he tried to escape responsibility that the proofs were prepared by his employees and their knowledge would be imputed to him.

(Assignment of Error XCI, V. VI, p. 3412.)

Fifth. The court erred in considering the suspicious circumstances surrounding the fire in connection with the alleged fraud and false swearing.

(Assignments of Error LXXXVI, LXXXVII, LXXXVIII, V. VI, p. 3411.)

Sixth. The court erred in considering that the amount of insurance carried on the stock was a suspicious circumstance.

(Assignment of Error LXXXIV, V. VI, p. 3411.)

Seventh. The court erred in holding that the failure to settle the loss by aribitration was due to the conduct of plaintiff and his appraiser.

(Assignments of Error CXIV, CXV, CXVI, CXVII, CXVIII and CXIX, V. VI, pp. 3418-3419.)

Eighth. The court erred in failing to find the amount of plaintiff's loss as represented by unsalvaged merchandise as distinguished from salvaged merchandise and burned out of sight merchandise.

(Assignments of Error XCVI, XCVII, XCVIII and XCIX, V. VI, p. 3414.)

Ninth. The court erred in finding that the pricing and grading of the merchandise on the Radford inventory was fraudulently padded, and that there was deception as to price or quality,

and fraudulent manipulations of records by plaintiff.

(Assignments of Error CIII, CIV, V. VI, p. 3415; Assignments of Error CV, CVI and CIX, V. VI, pp. 3416-3417.)

Tenth. The court erred in finding that plaintiff ever repudiated the accuracy of his books.

THE FIRST ERROR RELIED UPON.

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR SPECIAL FINDINGS.

Summary: The memorandum opinion of the trial court does not comply with Equity Rule 70½, nor with permitted variations thereof; findings of fact and conclusions of law are not separately stated; the opinion is discursive, argumentative and indefinite; the court failed to find on the principal issue of the case; other findings made were not within the issues.

ARGUMENT.

At the conclusion of the trial plaintiff made a motion for special findings. (V. VI, p. 3380.) The motion was denied and the memorandum opinion of the court adopted as its findings of fact and conclusions of law. (V. I, p. 203.) The denial of the motion was specified as error. (V. VI, p. 3421.)

Equity Rule 70½ is as follows:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts spe-

> cially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record, and if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

This rule has the force and effect of law. (*Roosevelt v. Missouri State Life Ins. Co.* (C. C. A. 8th), 70 F. (2d) 939, 945; *Northwestern Mutual Life Ins. Co. v. Keith* (C. C. A. 8th) 77 F. (2d) 374.)

This court recognizes the necessity of compliance with Equity Rule 70½, but has permitted some variation therefrom.

> *Parker et al. v. St. Sure,* 53 F. (2d) 706;
> *National Reserve Ins. Co. v. Scudder,* 71 F. (2d) 884, 888.

In each of the foregoing cases this court recognized its inherent power to require compliance with the rule and that it would determine in each case whether there was such compliance. Thus in the latter case this court stated:

> "We do not wish to be understood as holding that a mere discussion of the facts by the court in an opinion will be deemed a sufficient compliance with the rule, and we reserve the right in each case to decide whether the findings and conclusions as set forth in the opinion should be accepted in lieu of separate and distinct findings, or whether the case will be returned to the trial court for appropriate findings."

Particulars in Which the Memorandum Opinion Does Not Conform to Equity Rule 70½, Nor to the Permitted Variation Therefrom.

The memorandum opinion of the trial court adopted as its findings of fact and conclusions of law does not conform to Equity Rule 70½, nor to the permitted variations thereof in the following respects and particulars, to-wit:

(a) Findings of fact and conclusions of law are not separately stated;

(b) The opinion (if considered as findings) is discursive, argumentative, and indefinite;

(c) The court failed to find on the principal issues of the case, to-wit, the amount of appellant's loss and the alleged false swearing in reference thereto;

(d) Many of the findings, or purported findings, are not within the issues.

We discuss briefly in the order stated these several defects in the findings:

(a) A mere casual examination of the lengthy memorandum opinion of the trial court (V. I, pp. 174-203) demonstrates that the court totally failed to make separate findings of fact and conclusions of law, but mingled a discussion of law and fact throughout its opinion. The violation of Equity Rule 70½ is so extreme in this regard, and the result so prejudicial to appellant by the many extraneous and unnecessary statements of the trial court, that in this case the

judgment should be reversed. The opinion is more in the nature of a brief for appellees than a judicial decision.

(b) The memorandum opinion, if considered as findings of fact, is discursive, argumentative, and indefinite.

That the foregoing statement fits the memorandum opinion can best be shown by a few illustrations. From page 175 to page 179, V. I, the memorandum opinion discusses alleged suspicious circumstances and then states "I have gone into this evidence thus in detail because the suspicious circumstances surrounding the fire may be considered in connection with the defense of fraud and false swearing." (V. I, p. 179.) (We believe that elsewhere we can demonstrate that the court erred in this conclusion.) Thus the court demonstrates that its consideration of the suspicious circumstances is merely as an argument on another point.

The court states:

> "The values in the original proof of loss were padded * * *" (V. I, p. 180.)

This is a statement or conclusion which has no definite meaning, and is not a finding upon any issue. It cannot possibly be of any assistance to this court.

In its opinion (V. I, pp. 183 to 185), the court discusses the burning of burlap, the extent of the fire, the testimony of fire chiefs, all purely discursive and argumentative.

Again the court states:

> "Plaintiff, on the witness stand, devoted most of the first day of the trial to establish the accuracy and completeness of his books * * * subsequently in the course of the trial plaintiff repudiated the accuracy of his books." (V. I, p. 186.)

We are unable to find anything in the record to the effect that plaintiff-appellant either affirmed or denied the accuracy of his books. The statement of the trial court above quoted is no finding of any fact; it is only a reflection on appellant, and we believe is without basis.

Again the court states:

> "There was a deliberate deception as to price." (V. I, p. 188.)

This statement, of course, by innuendo refers to plaintiff. It is not a finding on any issue, and is indefinite as a finding of any fact; it is in substance only an argumentative conclusion reflecting on appellant's case.

Again the memorandum opinion states:

> "It is in itself significant that Hood & Strong were employed for the preparation of this report and the reports on which this case went to trial, instead of Ernst & Ernst, who were familiar with the books."
>
> (V. I, p. 190.)

It seems to be self-evident that this statement is nothing but an argument designed to reflect upon the case of plaintiff.

Many other instances might be added, such as the "fraudulent manipulation of records by plaintiff" (V. I, p. 192) (plaintiff never placed a figure in his books or directed the placing of a figure therein); "Colbert (was) induced by plaintiff to betray the interests of his employer." (V. I, p. 198.) If true, this matter had no connection with this case, and is another argumentative reflection on appellant.

Further the court states:

> "I have discussed with some detail which I believe supports my finding that plaintiff was guilty of fraud and false swearing in connection with his proofs of loss and the pleadings and testimony in this case, and that his conduct has barred his right of recovery herein."
>
> (V. I, p. 203.)

The foregoing statement is too indefinite to constitute a finding of fraud or false swearing, and the latter portion could be known only to the trial court. Note the words "that his conduct has barred his right of recovery herein". Can this court assume, or can anyone determine what the trial court meant by the "conduct" of plaintiff which "has barred his right of recovery herein"? This is not a finding on any issue, nor even an attempt to do so, and what was in the mind of the court is forever hidden by the shroud of death.

Although other instances might be mentioned, we believe that the foregoing demonstrate that the memorandum opinion was indefinite, discursive and argumentative in the extreme, and it was such in a way

that reflected unfavorably upon appellant and his case, and was thereby prejudicial.

The opinion was not in accordance with the general law governing findings. This law was stated by Justice Butler in his dissenting opinion in *Los Angeles Gas & Elec. Corp. v. Railroad Commission,* 289 U. S. 287, 327, 53 Sup. Ct. 637, 652, 77 L. ed. 820, 841:

> "The command that the trial court 'shall find the facts specially' means at least, that the statement shall be definite, concise and complete as distinguished from discursive, argumentative, obscure or fragmentary."

(c) The court failed to find upon the principal issue in this case.

The principal issue in this case arose upon the answer of defendants on false swearing. In substance, this answer was that plaintiff in his proof of loss swore that his loss was $73,601.96 when he knew that his loss did not exceed $35,000.00. (V. I, pp. 25-26; V. I, pp. 43-44; V. I, pp. 57-58; V. I, p. 132.)

The court failed to find upon the issue raised by this answer because it never made any finding as to what was the total loss of appellant. Not only did the court fail to find upon this issue, but it did not even correctly state it in the memorandum opinion. Thus in the memorandum opinion (V. I, p. 180) the court states that it is alleged that there was false swearing by plaintiff in making his proof of loss. However, the false swearing was not, and of course could not be, so generally pleaded. The court entirely omitted the second element alleged in the

answer, that plaintiff knew that his loss did not exceed $35,000.00; and it entirely disregarded this element in its long discussion of the facts and law involved in this case.

This issue was the only substantial issue of false swearing in this case, and before it could be held that appellant was guilty of false swearing, it was necessary for the court to find that appellant knew that his loss did not exceed $35,000.00 when he filed his proof of loss. No such finding was made and the court did not find what appellant's loss was or what he believed it to be when his proofs of loss were filed.

The importance and necessity of such finding is apparent from the fact that the court impliedly finds that appellees consented to an auction sale as a method of determining the loss on the salvaged property. (V. I, p. 191.) If this was intended to be the finding of the court, then the loss on the salvaged merchandise was the difference between the inventory thereof of $86,807.98 and the net proceeds of the sale, which were $27,742.32, leaving the loss at $59,065.66. In addition to this the court finds the out of sight loss was $2000.00, and makes no finding in reference to unsalvable merchandise. On the foregoing basis appellant's loss was at least $61,000.00. The defendants did not allege, and it cannot be assumed that they would have alleged, such a small difference between the claim of loss and the actual loss was false or fraudulent. Their whole answer was upon the averment that appellant's loss did not exceed $35,000.00 and he knew it when he verified his proof of loss.

There is no finding, either express or implied, on this averment.

(d) Many of the findings made by the trial court were not within or not responsive to the issues or were upon merely evidentiary matters.

As previously stated, the single substantial issue presented by the answer was that plaintiff swore that his loss was $73,601.96 when he knew that his loss did not exceed $35,000.00. On this issue there was no finding.

None of the defendants alleged that the values in the proof of loss were padded; that plaintiff's claim for out of sight loss was exaggerated; that the proportion of loss claimed on salvaged goods was excessive; that there was deception as to price or a false claim as to any particular item. While evidence of such matters was admissible under the pleadings in an attempt to establish the alleged fact that appellant's loss did not exceed $35,000.00, and that he knew it, findings on such evidentiary facts were not responsive to any issue in the case and cannot sustain the judgment. While we believe that the foregoing is the general rule in reference to findings, it certainly is the rule where fraud is claimed.

No rule of law is better known than that fraud which is relied upon must be specifically alleged, and if it is not alleged it cannot be proved or found. Undoubtedly also, it should be held that except as alleged in their answers that appellant claimed his loss was $73,601.96 when he knew that his loss did not ex-

ceed $35,000.00, appellees waived any other claim or claims of fraud.

The following authorities support the above statements:

"One against whom charges of fraud are made is entitled to specific averments of the acts of which he is accused, so that he may admit or deny them, and thus present the real issues."

12 *Cal. Jur.* 801.

"It is a cardinal rule in equity pleading that the allegata and probata must agree."

Noonan v. Nunan, 76 Cal. 44, 49;

21 *Cal. Juris.* 259.

"A party must recover, if at all, according to his pleadings, and upon the cause of action or defense alleged therein, rather than upon some other and different cause which may be developed by the proof."

21 *Cal. Juris.* 259-260;

Brown v. Sweet, 95 C. A. 117, 125.

"A defense which is not pleaded cannot be considered, although shown by the evidence." (Headnote.)

Wilson v. White, 84 Cal. 239.

"A judgment cannot be sustained unless the proof establishes the cause of action alleged in the complaint, even though a different cause of action be fully proved."

21 *Cal. Juris.* 260.

In a case involving fire insurance the Supreme Court of California held that evidence which was properly admitted upon certain issues of the pleadings could not be considered as establishing fraud and false swearing which was not definitely pleaded.

Greiss v. State Investment and Insurance Co., 98 Cal. 241.

The failure of the trial court to make special findings in accordance with the motion therefor, and in compliance with Equity Rule 70½ requires correction by this court. Lack of such compliance resulted in the case being remanded in the 8th Circuit.

Edwards v. Holland Banking Co. (C. C. A. 8th), 75 F. (2d) 713;

Humphrey v. Helgerson, 78 F. (2d) 484.

In the case of *Panama Mail S. S. Co. v. Vargas,* 281 U. S. 670, which went up from this circuit (33 F. (2d) 894), the Supreme Court remanded the case for lack of findings. Equity Rule 70½ and the similar Admiralty Rule had not been adopted at that time, but they have since been adopted and we believe that case is authority for remanding. This would necessitate a new trial. Perhaps such is the practical procedure, for this court should not be called upon to separate the wheat from the chaff in the long memorandum opinion of the trial court herein.

THE SECOND ERROR RELIED UPON.

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF WAS GUILTY OF FRAUD AND FALSE SWEARING IN HIS PROOFS OF LOSS AND THAT THERE WAS OVER-VALUATION WHICH RESULTED FROM AN INTENTIONALLY FRAUDULENT ATTEMPT TO GET AN EXCESSIVE AWARD FROM DEFENDANT INSURANCE COMPANIES; FURTHERMORE, ANY DEFENSE OF FALSE SWEARING WAS WAIVED. (Based Upon Assignments of Error XC and LXXXIX, V. VI, p. 3412, said assignments are based upon the memorandum opinion of the Court, V. I, pp. 180, 181, and 203; and upon memorandum denying rehearing, V. I, p. 233.)

Summary: There is no basis for finding fraud in this case; the finding of fraud is too indefinite to support a judgment; the findings of false swearing is also too general and indefinite; the evidence does not support a finding of false swearing by plaintiff in his proofs of loss, for the law of false swearing requires that the alleged false swearer know that he is swearing falsely and such knowledge does not appear in this case; if over-valuation occurred, it resulted from the calculation of able and reputable accountants; furthermore, appellees for many months treated the policies as in full force and effect, and by their conduct waived any defense of fraud or false swearing, and the court should have so found.

ARGUMENT.

Fraud and false swearing are not identical terms, and for convenience and clarity they are considered separately.

There is No Basis for a Finding of Fraud in this Case.

The appellees have never parted with one dollar to appellant herein. They have always resisted appellant's claim, hence it is a necessary conclusion that they have never relied upon and never been injured by any statements or representations of plaintiff, and in the absence of such reliance and such injury, fraud, which may be the basis of an action or defense, is not shown.

> "Fraud without injury is never available as a defense in equity."
>
> *Miller & Lux v. Enterprise Co.,* 142 Cal. 208, 214.

> "It is equally well settled, however, that fraud, unproductive of injury, 'will not justify a rescission, nor support an action either for rescission or damages'."
>
> *Darrow v. Houlihan,* 205 Cal. 771, 774.

> "Fraud without damage is not a defense."
>
> *Hunter v. McKenzie,* 197 Cal. 176, 183.

> "The law seems well settled that fraud without damage gives rise to no cause of action."
>
> *Litchtenberg v. Burdell,* 101 Cal. App. 20, 37.

It follows that fraud, as distinguished from false swearing, should be eliminated as an element in this case.

The Finding of Fraud is too Indefinite.

The finding that plaintiff was guilty of fraud in making his proofs of loss is too indefinite to support the judgment in this case. No principle of law is more firmly established than that fraud cannot be pleaded in general terms, but it must be pleaded specifically; and as it must be pleaded, so must it be found.

Even in its order denying the petition for rehearing, and whereby the trial court attempted to correct its findings, the court did not make its finding sufficiently definite. This portion of its order was as follows:

> "Second, in order to avoid any possible misunderstanding, I find that plaintiff was guilty of wilful and intentional fraud and false swearing in making his proof of loss."
>
> (V. I, p. 233.)

Such statement is entirely too vague and indefinite to comply with the law as to pleading or finding fraud.

> "One against whom charges of fraud are made is entitled to specific averments of the acts of which he is accused, so that he may admit or deny them, and thus present the real issues."
>
> 12 *Cal. Juris.* 801.

> "Whenever fraud constitutes an element of a cause of action or defense which is of an affirmative nature, the facts must be alleged."
>
> 12 *Cal. Juris.* 800.

"Allegations of fraud, being serious in their effect, a finding should ordinarily be expressly made by the court on each issue presented. Fraud is never presumed."

Floyd v. Sierra Grande Dev. Co., 51 Cal. App. 654, 664;

Gillon v. Metcalf, 7 Cal. 137;

Davis v. Robinson, 10 Cal. 411.

"The findings of fact should be definite and certain. They should be so framed that the defeated party can specify intelligently the particulars in which they are not supported by the evidence, where such point is made, and that an investigation is not required upon review to determine what issues have been decided."

24 *Cal. Juris.* 963-964.

"The essentials of findings of fact are that they should be clear, concise, intelligible, definite, certain, unequivocal, direct, positive, and conclusive, and not be vague or evasive."

64 *C. J.* 1247-1248.

Findings of False Swearing too General and Indefinite.

The finding that plaintiff was guilty of false swearing in connection with his proof of loss or in making his proof of loss is subject to the same vice as the finding of fraud. It is too indefinite and uncertain to support any judgment. Doubtless, as in the case of fraud, allegations and findings of false swearing should be specific. However, upon the alleged false swearing that plaintiff claimed a loss of $73,601.96 when he knew his loss did not exceed $35,000.00, the

court made no finding. The court, therefore, did not determine the only substantial issue of false swearing in the case, but makes a finding of uncertain reference. This court cannot know or assume what was in the mind of the trial court from the words used.

The Law of False Swearing.

False swearing is the intentional false statement of a material fact under oath. To constitute false swearing the person under oath must know at the time he swears that the fact he swears to is untrue. Such is the California law, as appears from a number of decided cases, and this case is, of course, governed by the law of California, where it arose. The following cases establish the law of California courts:

In the late case of *Singleton v. Hartford Fire Ins. Co.,* 127 Cal. App. 636, 645, in which a hearing was denied by the California Supreme Court, the following instruction was approved as a correct statement of the law:

> "You are instructed that by false swearing and fraud that will forfeit a policy is meant wilful fraud or false swearing, and not the result of inadvertence or mistake. It should be knowingly and wilfully false, or intended to defraud the company; or if not so intended, must relate to some matter material to the inquiry concerning which the company has a right to know the truth and the effect of which would have a bearing upon its liability. Therefore, if you should find that the plaintiff did make any false statement, that is not sufficient to void the policy unless you further find that his state-

ments were knowingly and wilfully false and intended to injure the company, and if not so intended, must relate to some matter material to the inquiry concerning which the company has a right to know the truth and the effect of which would have a bearing upon its liability."

In the same case the following quotation from the syllabus of *Helbing v. Svea Ins. Co.,* 54 Cal. 156, is approved:

"A provision in the policy of insurance that the application for insurance has been considered as a warranty, and that if the property insured is over-valued in it, the policy shall be void, applies only where the statement as to value is intentionally false. So also, where the policy provides that all fraud or attempted fraud by false swearing as to the loss shall cause a forfeiture of all claims under the policy, a wrongful or intentional false swearing is intended and not a mere discrepancy or innocent error. Also, whether fraud is inferred from an excessive statement of the value of the property in the original application, or of the loss in the preliminary proofs, is a question of fact, and in neither case does a legal presumption of fraud arise; nor is the burden cast upon the insured to establish that his statement was not intentionally false."

And also in the same case, a quotation from the syllabus of *Miller v. Firemen's Fund Ins. Co.,* 6 Cal. App. 395, in the following words, is approved:

"Though wilfully false statements in the proof of loss void the policy when it so provides, yet an untrue statement, to have that effect, must

> have been knowingly and intentionally made by the insured, with knowledge of its falsity, and with the intention of defrauding the company. Whether a false statement was so made is a question of fact for the jury."

Other California authorities to the same effect are:

Raulet v. Northwestern etc. Ins. Co., 157 Cal. 213, 236;

West Coast Lumber Co. v. State, etc. Ins. Co., 98 Cal. 502, 510;

Clark v. Phoenix Ins. Co., 36 Cal. 168, 176.

In the case of *Alliance Ins. Co. v. Enders,* 293 Fed. 485, which arose in Idaho, the late Judge Rudkin, speaking for the court held under the Idaho Statute and following the Supreme Court of Idaho that:

> "The intent is an essential element in the offense of false swearing, and it does not appear from the evidence, that the false statement in the proof of loss was knowingly made by plaintiff."

Measured by the law stated, the evidence does not support a finding of false swearing by appellant in his proofs of loss.

There is No Basis in the Evidence for Holding that Plaintiff Swore Falsely to the Proof of Loss, or that there Was Any Fraudulent Over-valuation.

Appellant was not in personal charge of the factory at the time of the fire and has not been for two or three years. (V. I, p. 467; V. I, pp. 482, 511.) Nat-

urally he did not know what his stock consisted of. (V. I, pp. 482, 483-4.) He depended upon his men in making up his claims. There was nothing else to do. (V. I, p. 515.) The preparation of the proofs of loss was left to Taylor and Sugarman. V. I, pp. 394, 395; V. I, p. 442; V. I, pp. 528, 532.) He had nothing to do with the detail of the business (V. I, p. 540); he made most of the purchases and all the sales and could not handle other details. (V. I, pp. 546-7.) After the first Hood and Strong report of Nov. 1929, the claim was made showing loss of approximately $73,000.00. (V. I, p. 514.) This report is referred to and is shown to be the basis of plaintiff's claim in the proof of loss itself. (Defendants' Exhibit A, V. I, pp. 413, 439. See p. 423 which states "Merchandise value on 10/19/29 as per Hood & Strong, report attached $102,453.23.") This Hood & Strong report is Plaintiff's Exhibit I, pages 246-248. This report reached an estimate of the values on the day of the fire by taking the inventory of December 31, 1928, adding all purchases thereto up to October 19, 1929, and deducting all sales for the same period, less the same percentage of gross profit which was made in the year 1928, and deducting inventory at other locations on October 19, 1929, to arrive at the inventory in the factory on the date of the fire. This whole calculation of Hood & Strong appears in the record. (V. I, p. 248.)

The accuracy of the original claim filed of course depended on two facts, to-wit: The accuracy of the inventory of December 31, 1928, and the fact that the

same percentage of gross profit was received from January 1, 1929 to October 19, 1929. Of course, no one claimed to know this definitely and hence the first report of Hood & Strong, Plaintiff's Exhibit 1, was at best an approximation of the values in plaintiff's factory on October 19, 1929. The report itself shows it was not based on an audit of the accounts. (V. I, p. 246.)

After filing his proof of loss, plaintiff decided to employ the firm of Hood & Strong to make an actual check of his records to determine definitely just what his loss was. This report was based on an actual audit of purchase and sale accounts from May 31, 1929 to October 19, 1929. On May 31, 1929 the firm of Ernst & Ernst, Certified Public Accountants, made an audit of the accounts of Hyland Bag Company and verified the inventory by physical count and certified to its assets and liabilities. (Plaintiff's Exhibit 4, V. I, pp. 255, 265.) Beginning with this inventory of May 31, 1929, as certified to by Ernst & Ernst, the firm of Hood & Strong audited plaintiff's accounts, added all purchases and deducted all sales from May 31, 1929, to October 19, 1929, and arrived at what should be the total stock on hand on October 19, 1929, and from this amount deducted the actual stock on hand at other places, and thus arrived at the stock on hand at 243 Sacramento Street on the date of the fire. The report is Plaintiff's Exhibit 2. (V. I, pp. 249 to 251.) This report states that on the basis of this audit "We have developed the sum of $132,947.44 as being in our opinion a conservative valuation of

the merchandise on hand at No. 243 Sacramento Street at the close of business October 19, 1929." (V. I, p. 250.)

This audit was further supplemented by an effort to determine the actual materials on hand, on October 19, 1929 in the following manner: Ernst & Ernst furnished the detail of the inventory as taken by them on May 31, 1929. (Plaintiff's Exhibit 29, V. I, pp. 285, 287.) Hood & Strong thereupon took this inventory and added thereto the actual purchases of materials and deducted the actual sales, and reported that the actual cost of materials on hand, not including manufacturing costs of bags on hand, nor miscellaneous merchandise, was $124,728.20. (Plaintiff's Exhibit 30, V. I, pp. 288, 293.) Mr. Richards of the firm of Hood & Strong who testified as to all these reports, stated that he accounted for the difference shown by the values in Plaintiff's Exhibit 2 and Plaintiff's Exhibit 30, by the fact that Exhibit 30 was a compilation of raw material only, and did not take into account the cost of manufacturing such bags as were on hand on October 19, 1929, and some other miscellaneous items which were left out. (V. III, pp. 1177-8.)

The figures used in plaintiff's amended complaint were those supplied by Hood & Strong as shown by Plaintiff's Exhibit 2. (V. I, p. 396; V. I, p. 251; V. I, p. 12.) The theory of plaintiff was that the report of Hood & Strong, Plaintiff's Exhibit 2, was a more accurate determination of the value of his stock than Plaintiff's Exhibit 1, on which his proofs of loss were based. (V. I, pp. 12, 13; also V. I, p. 515.)

The plaintiff's factory consisted of four floors, a basement and a mezzanine between the first and second floors. (V. I, p. 237; V. I, p. 240.) As has been stated before, plaintiff had not been in personal charge of his factory for two or three years. Even if appellant had been in personal charge of his factory, it would obviously have been impossible for him to know the details of the stock of so large a business. There is obviously no knowledge of appellant on which to predicate the claim that appellant swore falsely in making his proof of loss.

Apparently, however, it is claimed that plaintiff swore falsely because his stock sheets or perpetual inventory showed stock on hand of the value of $88,-272.55 at the time of the fire, according to the testimony of R. V. Smith, insurance adjuster. (V. V, pp. 2757-8.) Appellant denied such knowledge (V. I, pp. 508-9), and did not remember any such conversation with Mr. Smith. (V. I, pp. 509-11.) There is also the testimony of Mr. Taylor, plaintiff's bookkeeper, who testified "always when I had made a physical count of that material, I would find more material on hand than is shown on the stock sheet." (V. III, p. 1365); and again: "Any day you took an inventory, you would have considerable more burlap on hand than the stock sheets showed, running into very large figures." (V. III, p. 1365.)

Furthermore, Mr. Terkelson, a witness called by appellees, testified that following the fire he kept asking what the values were and no one knew, but he was informed they might run around $130,000.00. His

testimony was: "I kept asking, I asked Mr. Taylor on three or four occasions, I asked Mr. Hyland, and I asked Mr. Sugarman on several occasions also if they had any idea what the valuations were, so that I could assist in the apportionment of the claim. Everyone I asked told me they didn't know. I have a hazy recollection that I was informed on Monday, October 21, 1929, that the valuations might run around $130,000.00, but it did not come from any official source." (V. VI, p. 2970.)

A summary of the inventory taken on September 30, 1929, for insurance purposes, showed merchandise at landed cost in plaintiff's factory of a value of $151,898.72. (V. III, pp. 1397, 1400, Plaintiff's Exhibit No. 98.) The total purchases from October 1 to October 19, 1929, was $39,218.73 (V. III, p. 1401) and the total of the inventory on September 30, 1929, plus the purchases showed a total inventory on October 19, 1929, of the same amount as the Hood & Strong report, Plaintiff's Exhibit 2. (V. III, p. 1402.) The inventory of merchandise on hand on October 19, 1929, at the factory amounted to $132,947.44, not taking into consideration an item of $847.98 representing inks. (V. III, p. 1406.) Another computation by Hood & Strong, showing valuation of burlap, cotton and twine on hand at cost on October 19, 1929, was a total of $106,643.29 for these three items. (V. III, pp. 1425, 1431, Plaintiff's Exhibit 101.) After the fire Mr. Taylor attempted to prepare a memorandum from his stock sheets purporting to represent the merchandise on hand at the factory on the day of the fire.

(V. III, pp. 1416-17.) He could not find the memorandum at the time of the trial, but it was among the papers handed over to Cerf & Cooper. (V. III, pp. 1447, 1448.) The result of this computation was not conveyed to Mr. Hyland or Mr. Sugarman. (V. III, p. 1447.) The papers delivered to Cerf & Cooper were not returned to him. (V. III, p. 1449.) Mr. Taylor's recollection was that his summary of the stock sheets showed a valuation of $88,000.00 or $89,000.00 on the day of the fire. (V. III, p. 1500.) Except from his ledger and incomplete stock sheets he had no record showing the goods on hand at Sacramento Street on October 19, 1929. (V. III, p. 1533.) He could not determine from the stock sheets what was in the plant on the day of the fire. (V. III, p. 1601.) Mr. Smith, adjuster, testified that he stated to Mr. Taylor that he did not have any confidence in perpetual inventories. (V. V, p. 2785.) His experience had demonstrated that they were not reliable. (V. V, pp. 2785-6.) And Mr. Smith himself suggested that "undoubtedly there will be a lot of things which are not kept a record of." (V. V, p. 2632, also V. V, pp. 2798 and 2799.) Plaintiff testified that he noticed what he would judge a lot of ashes after the fire. (V. I, p. 471.) It appears from the testimony of disinterested witnesses that a great deal of debris was removed following the fire. (V. VI, pp. 3050 to 3060; V. II, pp. 767-8.) There was some out of sight loss as the court finds. (V. I, p. 185.)

The evidence showing the general basis of plaintiff's claim may be summarized as follows, to-wit:

First: It appears indisputably from the evidence that plaintiff was not in personal charge of his factory at the time of the fire, and therefore could not know of his own knowledge what was in stock.

Second: Even if plaintiff had been in personal charge of his factory, the stock was so large and the items so many, and the business so large in size, that it would have been beyond the possibilty of any individual knowing in detail what was on hand.

Third: There were no records which showed accurately the quantity of appellant's stock on hand at the time of the fire. Mr. Taylor, appellant's bookkeeper, stated that he kept stock sheets (called by some a perpetual inventory) but these were incomplete and that the physical inventory always far exceeded what appeared on these records. Mr. Smith, adjuster for several of the appellee companies, himself stated that he had no confidence in perpetual inventories.

Fourth: Many loads (a total of sixteen) of debris were removed following the fire, consisting of fragments of burned cotton and burlap, etc. Furthermore, appellant saw what he judged were a lot of ashes following the fire.

Fifth: Not having actual knowledge of the quantity of his stock, and no accurate record thereof, appellant employed certified public accountants to establish from his books the amount of his stock on hand on October 19, 1929, at the time of the fire.

Sixth: Plaintiff's proof of loss, as appears therefrom, was based upon the first report of these ac-

countants. This report was placed in the hands of the representatives of the various appellees prior to filing the proofs of loss.

Seventh: Appellant's claim as made in his amended complaint herein, was based upon a later report and audit by said certified public accountants. This later report was based upon what would appear to be a more accurate method of ascertaining the amount of stock than that used in preparing the first report.

Eighth: This second report of the certified public accountants reconciled in substance with the summary of inventory taken on September 30, 1929, for insurance purposes, which summary was prepared for report for insurance purposes under "reporting" policies.

Ninth: There is not any suggestion anywhere that appellant ever put a figure in his books, or ever directed anyone to put any particular figures therein, or that he even suggested to anyone the placing of an untrue figure thereon, nor that he ever suggested to any accountant employed by him the making of an untrue or exaggerated statement or report as to values or quantity of stock on hand, or that he did otherwise than attempt to ascertain as accurately as possible the quantity of his stock on hand the day of the fire.

Conclusion—No False Swearing in Fact.

From the foregoing basic facts, it seems elementary that appellant cannot be charged with false swearing

as to his claim for the total amount of stock on hand at the time of the fire as shown by able and reputable certified public accountants after an audit of his books. Any suggestion to the contrary simply has no foundation whatsoever in the evidence. If there is any over-valuation in the claimed total of plaintiff's stock at the time of the fire, or in the claimed total of his loss, it is the error of capable and reputable accountants.

Any Defense of False Swearing Was Waived by Defendants.

Even if there was any basis for a claim of false swearing in fact, the evidence in this case indicates that the appellees waived such defense and the trial court should have so found. The court, however, failed to make any finding of this waiver.

The facts of the waiver are shown by the record:

About two weeks after the Radford inventory was finished appellant desired to sell the salvaged merchandise to the best advantage. (V. II, p. 993.) Appellant filed his proof of loss which claimed his loss at $73,601.96. It included out of sight loss in the sum of $15,645.25, and the estimate of damage to salvaged merchandise and the pricing thereof. The defendants disagreed to the claimed loss, and demanded appraisement. The goods were held, the market was declining, expenses accrued, and finally the merchandise was sold at auction slightly more than six months after the fire occurred. The delay and the handling of the merchandise naturally cost several thousand dollars.

In their objection to the proof of loss, appellees did not claim any false swearing. For several months following its filing they did not deny liability or assert any forfeiture by reason of such false swearing. They participated in the sale of the merchandise at auction. Their conduct at all times was that the contract was in full force and effect and that they were liable thereon. These facts, we believe, establish a waiver of any previous ground of forfeiture for claimed false swearing.

The general law in reference to waiver of a forfeiture of an insurance policy is as follows:

> "A waiver arises from acts, words, or conduct on the part of the insurer, done or spoken with knowledge of a breach of condition, which amount to a recognition of the policy as a valid existing, and continuing contract, or which are inconsistent with an intent to claim a forfeiture, or which are such as to reasonably imply a purpose not to insist upon a forfeiture. The rule is well settled that when the insurer, with knowledge of all the facts constituting a breach of a condition or a warranty, requires the insured, by virtue of the policy, to do some act or incur some trouble or expense, the forfeiture is deemed to have been waived."
>
> 26 *C. J.* 283.

Any cause of forfeiture of an insurance policy, including false swearing, may be waived.

> *The West Coast Lumber Co. v. The State Investment & Ins. Co.,* 98 Cal. 502, 511-512;
>
> *Concordia Fire Ins. Co. v. Koretz,* 60 Pac. 191 (Colo).

"The provision of the policy quoted above (fraud and false swearing) is for the exclusive benefit of the insurance company, and may be waived by it."

Solem v. Connecticut Fire Ins. Co., 41 Mont. 351, 355, 109 Pac. 432.

"Anyone may waive the advantage of a law intended solely for his benefit."

25 *Cal. Juris.* p. 929;

California Civil Code, Sec. 3513.

"Since the law favors the waiver of forfeitures, the amount of evidence necessary to establish such a waiver is less than that needed to establish a forfeiture. Waiver may be shown by parol, and by circumstances or a course of acts or conduct, proof of express language being unnecessary."

25 *Cal. Juris.* p. 932.

"It follows from the fact that forfeitures are abhorred that a waiver of forfeiture is favored and requires less evidence to establish than is required to establish a forfeiture. Indeed, it has been held that slight evidence of waiver is sufficient."

12 *Cal. Juris.* p. 642.

It is respectfully submitted, therefore, that not only was there no false swearing in fact, but even if there was, it is apparent that appellees waived any claim for forfeiture of the policies herein by reason of alleged fraud or false swearing in the proofs of loss, and that a finding of such waiver should have been made by the trial court.

The second error relied upon should be sustained.

THE THIRD ERROR RELIED UPON.

THE COURT ERRED IN HOLDING THAT THE HEART OF PLAINTIFF'S CONTENTION IS THAT LARGE QUANTITIES OF GOODS WERE BURNED OUT OF SIGHT, AND THAT UNLESS LARGE QUANTITIES WERE BURNED OUT OF SIGHT, PLAINTIFF'S CLAIMS ARE SO EXCESSIVE AS TO BE FALSE AND FRAUDULENT. (Assignment of Error XCII, V. VI, p. 3413.)

Summary: If the court meant by the word "heart" the largest or most important, it was clearly in error, as the claim of loss on salvaged merchandise was nearly 80% of the amount claimed in the proof of loss; but even if appellant's claim for out of sight loss is not sustained, appellant's claim is not rendered false and fraudulent; there was a reasonable and substantial basis for appellant's claim for out of sight loss, and the trial court found there was some out of sight loss; excessiveness of claim does not establish fraud as a matter of law; moreover, it appeared always in this case that the claim for out of sight loss was a matter of calculation and opinion, and therefore not fraudulent.

ARGUMENT.

The third error relied upon is based upon assignment of error XCII, V. VI, p. 3413, and said assignment of error is in turn based upon the following statement appearing in the memorandum opinion of the trial court:

> "The heart of the plaintiff's contention is that large quantities of goods were burned out of sight. The evidence as to the quantity and grades of merchandise remaining after the fire is complete. The valuation of these materials and determination of the extent of the damage to them are not

difficult problems. The amount of damage as evidenced by these materials is so far below even the lowest claims of loss that, unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent." (V. I, p. 182.)

The Meaning of "Heart" Used by the Court.

By the use of the phrase "heart of plaintiff's contention" in the foregoing statement, the court must have meant the largest or most important element in appellant's loss. Unless this meaning is attributed to the phrase in this connection, the statement of the trial court is so indefinite and uncertain as to be entirely meaningless, and useless as a finding or statement of any fact. Yet if the trial court used the phrase in connotation of largest or most important, it was demonstrably in error.

Plaintiff's Claim of Out of Sight Loss Never Most Important.

Plaintiff's original claim of loss was for the sum of $73,601.96 (V. I, p. 423); of that amount the sum of $15,645.25, or only slightly more than 21% was for merchandise burned out of sight or into such small fragments as to be unsalvable. Or deducting the sum of $15,645.25 claimed for out of sight loss from the total amount claimed, it is apparent that the amount of the loss otherwise claimed is the sum of $57,956.71. It thus appears as a mathematical fact that the out of sight loss was not the largest or most important part of the loss claimed by appellant, and therefore it was not the "heart" of plaintiff's contention.

It may be said, furthermore, that appellees never regarded appellant's claimed out of sight loss as the most important element of his claim. This is sufficiently apparent from the fact that appellees originally admitted that appellant sustained a loss amounting to the sum of $22,733.18 (V. I, p. 407), and later by their answers admitting that he sustained a loss not exceeding $35,000.00, yet they at no time, either at the trial or prior thereto, conceded ANY out of sight loss.

Therefore, both as a mathematical fact and from the attitude of appellees in this case it must be concluded that the trial court was in error in considering the "heart of plaintiff's contention" is the claimed out of sight loss.

Even if Appellant's Claim for Out of Sight Loss is Not Sustained for the Claimed Amount, Appellant's Claim is Not Thereby Rendered False and Fraudulent.

The question of the out of sight loss of appellant was and certainly is an important problem in this case, but the trial court could not, as a matter of law or fact, rightfully conclude that if appellant's claim for an out of sight loss or for unsalvable merchandise was not sustained, his claim was *ipso facto,* excessive and fraudulent. The court should rather have considered whether or not appellant's claim for out of sight loss had any reasonable and substantial basis, which was consonant with the good faith of appellant in making his claim. To determine whether or not appellant's claim for an out of sight loss comports with

good faith, let us examine the record to determine the basis of appellant's claim for out of sight loss.

The Basis of Appellant's Claim for Out of Sight Loss is Reasonable and Substantial.

As has already been pointed out, one of the first problems which confronted appellant after the fire was to determine what stock he had on hand at the time of the fire. To do this he employed able and reputable public accountants who furnished him the estimate received in evidence as Plaintiff's Exhibit 1. (V. I, p. 246.) There was also made a complete inventory of all salvable stock which appears in evidence as Plaintiff's Exhibit 42. (V. I, pp. 361, 377.) Appellant was in the situation then of having an estimate by expert accountants of what his stock amounted to at the time of the fire, and he had an inventory of what was left after the fire. The difference could only be accounted for by merchandise completely destroyed or burned into such small fragments as to be totally unsalvable, and hence plaintiff claimed this difference as merchandise totally destroyed. The method of calculation, and the calculation itself in arriving at this claim appears as part of appellant's proof of loss, which was received in evidence as Defendant's Exhibit A. (V. I, pp. 413, 439, the particular calculation referred to appears V. I, p. 423.)

Further justification for appellant's claim in this regard rests in the fact that appellant's own bookkeeper testified on the trial that his stock records were incomplete and that the physical quantity of

merchandise on hand always far exceeded what his records showed. The claim is also justified by the fact that appellant himself observed what he judged a lot of ashes, and by the fact that sixteen loads of debris were removed from the premises following the fire, including burned fragments of burlap, cotton goods, etc.

Under these circumstances, it is apparent that it would have been foolish for appellant not to make a claim for stock which should have been there at the time of the fire, but which was not, in fact, there following the fire.

Indeed, the justification for appellant's claim appears in the opinion of the trial court itself. Although it appears from the evidence that adjuster Smith, representing some of the defendants, considered there was no destroyed stock, and in the rejection of the proof of loss, nothing whatever was allowed for totally destroyed merchandise (V. I, p. 407), nevertheless, the trial court states:

> "I believe that some of the stock was burned out of sight, but that the amount was small. If it were necessary to determine the amount of out of sight loss, I should find that it was the difference between the perpetual inventory kept by plaintiff as of the date of the fire and the merchandise removed after the fire and counted by Radford, or approximately the sum of $2,000.00." (V. I, p. 185.)

The trial court, therefore, upholds appellant in claiming an out of sight loss of at least $2,000.00. And

if appellant was justified in claiming any out of sight loss, how was he to arrive at the amount of such loss otherwise than from the reports of his accountants?

The fact that the trial court determined that appellant claimed too much, should not at all lead to any conclusion that appellant's claim was fraudulently excessive when appellant made his claim upon the basis which any normal, reasonable, and honest individual would under similar circumstances.

Basis of Claim for Destroyed Merchandise Under Amended Complaint is Reasonable and Substantial.

The most substantial difference between appellant's claim under his amended complaint and in his original proof of loss was in an increase of his claim for merchandise burned out of sight or totally destroyed. This later claim was arrived at in exactly the same manner as that made in the original proof of loss, except that it was based upon what was deemed a more accurate determination by expert accountants auditing appellant's books to arrive at the stock of merchandise which appellant had on hand at the time of the fire. This report of accountants was introduced in evidence as Plaintiff's Exhibit 2. (V. I, pp. 249, 252.) It was supplemented by a later report, Plaintiff's Exhibit 30 (V. I, pp. 288-9) and reconciled substantially with the inventory summary made for report to insurance companies by appellant's bookkeeper on September 30, 1929, which appears in evidence as Plaintiff's Exhibit No. 98. (V. III, pp. 1397, 1400.)

Again we say, that if expert accountants report that so much merchandise should have been on hand at the time of the fire, and an inventory shows the quantity remaining after the fire, and a quantity of undetermined amount is destroyed as shown by debris, etc., then appellant as any reasonable, normal, and honest man, was justified in claiming as out of sight loss the difference between what remained after the fire and what his accountants said should have been there at the time of the fire. For so doing appellant should not be deemed guilty of an attempt at fraud, or of making an excessive claim.

Therefore, in so far as the trial court deemed appellant's claim for out of sight loss was fraudulently excessive, we submit that the trial court erred, and since the trial court deemed this was the heart of appellant's claim, the error certainly was substantial.

The Trial Court Erred in Holding that Excessiveness Established Fraud as a Matter of Law.

The trial court stated in the portion of its opinion above quoted:

> "Unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent."

In this statement it is apparent that the Honorable Trial Court labored under an error of law. As has been pointed out, no one knew the amount of goods entirely burned or burned to small fragments and removed as debris. In order, then, for appellant to have

been guilty of false swearing it must appear that appellant knew that the amount he claimed as an out of sight loss was grossly exaggerated. But this knowledge of appellant is a question of fact and not of law, and should be found as a fact and not made a legal conclusion.

The authorities are in general agreement that even though the statement of quantity or value of merchandise burned has been grossly exaggerated, fraud is not thereby established as a matter of law, but it must appear that the insured knew that his claim was false. Following, we believe, is a correct statement of the law which is supported by many authorities:

> "The mere fact that the assured in the proofs of loss, has made an over-valuation of the property destroyed will not defeat a recovery on the policy for the actual loss sustained. If the assured in making proofs of loss, acts in good faith, in the honest belief that the property destroyed was worth the amount of the valuation placed upon it, and the excessive valuation was not intended to deceive or defraud the insurance company, such over-valuation cannot be held to be fraudulent, and it will not defeat a recovery."
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> *Commercial Ins. Co. v. Friedlander,* 41 N. E. 183 (Ill.);
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> *Oshkosh Packing & Prov. Co. v. Mercantile Ins. Co.,* 31 Fed. 200;
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> *Helbing v. Svea Ins. Co.,* 54 Cal. 156;
>
> *Singleton v. Hartford Fire Ins. Co.,* 127 C. A. 635, 646.

Out of Sight Loss Claimed in this Case Was Matter of Opinion and Not Fraudulent.

The fact that in this case the amount claimed for out of sight loss was a matter of opinion or estimate from the calculations of the accountants Hood & Strong, appears from the proof of loss itself, which referred to their report. (V. I, p. 423.) The report referred to is Plaintiff's Exhibit 1 (V. I, pp. 246, 248) and it is also clearly shown from the testimony on the cross-examination of the witness, Ben Sugarman, who prepared the proofs of loss for appellant. This testmony was as follows:

> "As to R. V. Smith telling me in his opinion nothing was burned out of sight, I do not think I put it down to any definite amount; I told him there must be an out of sight there. I do not know what was burned out of sight. I endeavored to ascertain by the Hood & Strong statement. Yes, in answer to your question, 'You took the Hood & Strong statement setting the value at $102,000, you took the value set forth in the schedule attached to the proof of loss, and arrived at the opinion that the difference between them represented something that must have been burned out of sight?'" (V. II, pp. 1024-5. See also V. II, p. 1033.)

As a matter of opinion or estimate known to defendants to be such, the claim for an out of sight loss could not have been fraudulent.

On this point, the case of *Simon Cloak & Suit Co. v. Aetna Ins. Co.,* 141 N. Y. S. 553, is well considered.

There the claim was made that the difference between the plaintiff's claim and the verdict of the jury was so great that plaintiff's claim should be deemed fraudulent and the verdict set aside. The court stated in denying the motion to set aside the verdict:

> "It must be remembered, however, that every case of over-valuation, no matter how great or small, is not necessarily an instance of fraudulent misstatement. Therefore, whether the difference between the amount claimed and the amount awarded is of such nature and amount as to justify the court in setting aside the verdict depends on the facts of each case. Davis v. Guardian Ins. Co., 87 Hun. 414, 34 N. Y. S. 5332.
>
> Examining the matter under consideration, the evidence disclosed that the plaintiff asserted a claim much in excess of the amount of the loss as found by the jury. Perhaps it is safe to state that the difference amounted to more than 100 per cent. It is also evident from the testimony that the plaintiff had no means by which it could positively determine the value of the goods destroyed. That it was compelled to estimate its loss is indisputably apparent from the manner in which the loss was calculated. It is quite apparent that its misstatement was based upon an erroneous estimate. In consequence, the exaggeration of the value must be held to be an expression of an opinion, which does not operate to avoid the policy, since under such circumstances there is absent the essential of fraud. 13 Am. & Eng. Ency. of Law (2nd) 342."
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> *Simon Cloak & Suit Co. v. Aetna Ins. Co.,* 141 N. Y. S. 553, 555.

A similar holding has been indicated by the Supreme Court of California in the case of *Helbing v. Svea Ins. Co.,* 54 Cal. 156, 159. In that case the action was to recover loss on a stock of merchandise and the defense of false swearing was made. There was a verdict for plaintiff of $2,000.00, and the defendant appealed claiming, among other things, that plaintiff's claim was fraudulently over-valued. However, the court held the over-valuation could not have been fraudulent, stating:

> "It is true that soon after the fire the assured submitted their claim, wherein they alleged the aggregate of their losses to be over $4,500.00, but the claim was accompanied by an exhibit, from which it appeared that their estimate was based upon the amount of bills for goods purchased during a period of several months prior to the fire, less the amount of cash sales during the same period. It would not have been credible that the defendants could have been deceived by such a statement and exhibit, and it appears affirmatively that its agents were not deceived."
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> *Helbing v. Svea Ins. Co.,* 54 Cal. 156, 159.

In its opinion in the case of *Clark v. Phoenix Ins. Co.,* 36 Cal. 168, 176, the Supreme Court of California said:

> "Upon the question of fraud or false swearing on the part of plaintiff in estimating his losses, in actions of this character, a discrepancy between his estimate and the actual loss, as proved at the trial, which can be reasonably accounted for on the score of opinion, is entitled to no weight."
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> *Clark v. Phoenix Ins. Co.,* 36 Cal. 168, 176.

THE FOURTH ERROR RELIED UPON.

THE COURT ERRED IN FINDING THAT PLAINTIFF KNEW WHAT WAS IN HIS FACTORY AND THAT HIS CLAIM OF LOSS WAS OVER-VALUE, AND THAT HE TRIED TO ESCAPE RESPONSIBILITY FOR ANY OVER-VALUATION ON THE GROUND THAT THE PROOFS WERE PREPARED BY HIS EMPLOYEES, AND IN FINDING THAT THEIR KNOWLEDGE WOULD BE IMPUTED TO HIM. (Based Upon Assignment of Error XCI, V. VI, p. 3412.)

Summary: The proof of loss was prepared for plaintiff by Mr. Sugarman; pricing of articles was made by Mr. Taylor; the pricing was done in accordance with an agreement, or supposed agreement, between Mr. Sugarman, representing plaintiff, and Mr. Smith, representing appellees; if anything was overpriced, it was understood that it would be immaterial and harmless because any increase thereby would be equalized by decrease in out of sight loss: plaintiff did not know what his loss was, and there is no evidence he tried to magnify it; it is erroneous to impute errors of others to appellant as false swearing to establish a forfeiture.

ARGUMENT.

The error here relied upon is based upon the following portion of the memorandum opinion of the trial court:

> "Plaintiff attempts to avoid responsibility for any over-valuation on the ground that proofs of loss and the foundations for the claims sued for in this action were prepared by his bookkeeper and accountants hired by him and that he merely signed what was presented to him. I believe the evidence shows that such was not the fact—that plaintiff knew what was in his factory and that

his claim of loss was over-valued. In any event, under the circumstances of this case, the knowledge of his agents would be imputed to him." (V. I, p. 181.)

A consideration of the evidence pertaining to this matter shows that the proof of loss in this case was prepared by appellant's adjuster, Mr. Ben Sugarman, and the pricing of the items of salvaged merchandise shown on the Radford inventory was made by appellant's bookkeeper, Mr. George P. Taylor. The pricing was made in accordance with an understanding or a supposed understanding, between Mr. Sugarman and Mr. Smith, representing some of the appellees. It was a fact that appellant neither prepared the proofs of loss, nor priced the merchandise thereon, but he relied upon others to do this, though appellant swore to the proofs after they were prepared.

Thus appellant testified:

"I am not familiar with the schedule attached to our proof of loss. That schedule was made up by our accountant, Mr. George P. Taylor, and Mr. Ben Sugarman; I had nothing whatever to do with it. I did appear before a notary public and swear to the correctness of that statement. I knew that the schedules on that proof of loss were prepared for the purpose of presenting to an insurance company. And for the purpose of making a claim under that insurance policy. Acting on the advice of Mr. Ben Sugarman, our adjuster, who handled the entire matter, I caused it to be presented to the insurance company for the purpose of collecting money."

(V. I, p. 442.)

Again appellant testified:

"No, I was not thoroughly familiar with that schedule when I swore to the proof of loss. That schedule had been prepared, as I advised you before, by Mr. Ben Sugarman and by our accountant, Mr. George P. Taylor. I did none of the detail work. I swore to it. I was not thoroughly familiar with the Radford inventory; I had looked it over just casually. I was leaving all of that work to Mr. Taylor and to Mr. Ben Sugarman."

(V. I, p. 446.)

Appellant was not personally in charge of the factory at the time of the fire, and did not know of his own knowledge what materials were there. This appears in the evidence:

"Eliminating the patched grain bags, I do not know what any of the materials was * * * I was not personally operating the factory."

(V. I, pp. 483-4.)

"As I have stated before to you, Mr. Thornton, I had not been in the habit of visiting the factory very often for three years."

(V. I, p. 482. Also V. I, pp. 467 and 511.)

He further testified:

"Mr. Thornton. And in that claim you showed a valuation of $15,000 for merchandise burned out of sight.

Mr. Schmulowitz. I object to that because the document will speak for itself.

A. I do not recall the figures, or any of the details. I had nothing whatever to do with the making up of that claim."

(V. I, p. 514.)

And again:

"The prices set forth in that proof of loss represented our actual cost, to the best of my recollection. That is to the best of my belief. I don't know that to be an actual fact. I had nothing whatever to do with making that up."

(V. I, p. 527.)

And again:

"I cannot state 'whether any of the prices set forth in that schedule represented the actual value on October 19.' As I told you before, the work was handled entirely by Mr. Sugarman and by Mr. Taylor. I had nothing whatever to do with it."

(V. I, p. 528.)

And again:

"A. I did not set forth these values. I can only repeat that Mr. Sugarman and Mr. Taylor handled the entire thing. I personally had nothing whatever to do with it.

Q. Then you could not look at this inventory or at this proof of loss and tell us whether or not the values set forth as to cotton sugar liners, or A. B. S. sacks, or beet pulp sacks, or any of the other sacks included in there are correct?

A. It is my understanding that they were, or I would not have signed it. The work was left entirely in the hands of Mr. Ben Sugarman and Mr. Taylor."

(V. I, p. 529.)

Mr. Ben Sugarman testified:

That he discussed the pricing of the goods on the Radford inventory with Mr. R. V. Smith, adjuster

for several of the appellees (V. II, p. 980) and that it was agreed that a fraction of a cent should be added to take care of cables and other overhead (V. II, p. 980); that it was said "that if the inventory was slightly over-priced it would react against Hyland (appellant) and not against the insurance companies, because the higher that this was taken, the less the obliterated item would be" (V. II, p. 980); that he told Mr. Hyland "I thought the five bale (Bemis) price plus this fraction would be a proper basis for inventorying the goods, and I left the inventory with Mr. Hyland." (V. II, p. 981.)

Mr. Sugarman further testified:

> "Failing in arriving at an agreement with the adjusters concerning the amount of the loss, I undertook the preparation of the proof of loss to be filed on behalf of Mr. Hyland. The work was done in my office. I obtained the data appearing in that proof from the Radford inventory and the Hood & Strong report, plus a list of expenses incurred in the work, the total of which was given to me by Mr. Taylor; and in addition to that I had an inventory of stationery, an inventory of sample bags, and a valuation on the brand, which I had secured from, I think, Mr. Ledgett, and that is what I used to give me the information for making the proof up."
>
> (V. II, p. 985.)

Also:

> "My attention being directed to the merchandise totally destroyed being reported in that proof of loss at $15,645.25, I arrived at that figure as follows: I took the merchandise value shown by

the Hood & Strong statement, $102,453.23, and deducted from that the inventory of the Radford schedule, which showed $15,645.25. That was how I arrived at that figure."

(V. II, p. 986.)

And again:

"The other data appearing in the proofs of loss was likewise prepared in my office. And the blank spaces were filled in at my office. Upon the completion of the proofs of loss, I submitted them to Mr. Hyland. I requested him to sign them in the presence of the notary, and he suggested that we send for a notary and we 'phoned for Miss Herzog of Ray Benjamin's office, to come over and bring her seal, and she came over and Mr. Hyland signed it in my presence. Mr. Hyland glanced at the schedules appearing on each proof of loss, I would not say that he checked them."

(V. II, p. 988.)

And again:

"I had in mind that if this inventory was higher I was giving the insurance companies the benefit. Yes, I was, because that would decrease the out-of-sight damage. The higher the inventory the less the out-of-sight damage. Yes, I made the statement to Mr. Smith. As for his telling me I was crazy, I disagreed with him, and still do as to the out-of-sight damage being reduced. Subsequent to the pricing of that inventory I made up an estimate of the percentage of loss and damage on the items involved."

(V. II, p. 1006.)

He also testified:

"When the Radford inventory was completed as to the list of items, I brought it over to the premises on Sacramento Street. I was accompanied by my brother Harry. During all these events I was invariably accompanied by my brother Harry. We made a practice to go together on these missions, we go on 95 per cent of them together. When we went over to the premises of the Hyland Bag Company, we saw Mr. Hyland there. At that time I told Mr. Hyland that the inventory was through, was finished as to count, and it would now be necessary to have it priced. He showed me the Bemis list previously referred to, and I told him to price it on the large quantity price plus a fraction of a cent. As to having indicated what that fraction of a cent was to be, I have refreshed my memory on that since Friday; it was half a cent. Mr. Hyland told me to go and give this information to Taylor. I went out in back, to the bookkeeper's desk, and gave these instructions to Taylor, handed him the inventory and told him to get it out as soon as he possibly could. Mr. Taylor's office was to the rear of the premises on Sacramento street; Mr. Hyland's office was in the front. My brother Harry accompanied me to Mr. Taylor. I then repeated to Mr. Taylor what I had said to Mr. Hyland."

(V. II, pp. 1036, 1037.)

Mr. Taylor testified:

"Mr. Ben Sugarman one day brought it down to my desk—I think Mr. Harry Sugarman was with him, I know Mr. Ben was there, and he handed me the Radford inventory with a Bemis

price list, and he asked me to enter the prices opposite each item at the large-quantity price of Bemis, plus some kind of a carrying charge or an overhead of one-half a cent. I followed that out all the way through. And in making the notations that do appear on these sheets, it was my intention to cover the unit of material according to the Bemis price list, the large-quantity price. Yes, plus one-half cent to which Mr. Sugarman has made reference, he directed me to do it that way. So far as I know, those entries were correct. I intended that they should be correct, in accordance with that formula."

(V. III, p. 1450.)

He further testified as to the basis of values on bags in the Radford inventory. This appears as Defendant's Exhibit CC. (V. III, pp. 1554-5.)

The statement of the trial court that appellant attempts to avoid responsibility for any over-valuation on the ground that the proofs of loss and foundations for his claims were prepared by his bookkeeper and accountants is not just to appellant. In testifying how the claims were prepared and presented, appellant was merely stating the facts. He was not attempting to escape any responsibilty, but was explaining his lack of knowledge and inability to answer questions propounded to him.

It is manifest, too, from the evidence quoted, that appellant did not know what was in his factory and did not know and it did not believe that his claim of loss was over-valued, if in fact it was over-valued. He relied upon reports made up from his records as

any normal human being would have done. Any belief of the trial court that appellant personally knew what was in his factory, is a belief without foundation in the evidence, and is in fact contrary to the evidence.

Likewise, it is apparent that none of the appellant's agents had exact knowledge of what was in the factory, and hence there was no knowledge in appellant's agents which could be imputed to appellant. To find out what was in his factory expert accountants studied his records and furnished the reports which were placed in evidence. This is the only information which can be imputed to appellant, and appellant admits relying upon these reports. There is absolutely no suggestion in the evidence that any accountant acted dishonestly or attempted to exaggerate appellant's stock or claim.

It appears also that the salvaged merchandise was priced, or intended to have been priced by the Bemis 5 bale price, plus one-half cent per yard. From the evidence quoted above it is apparent that Mr. Ben Sugarman thought that this was in accordance with an understanding with Mr. Smith, and that the higher the inventory value of the salvaged merchandise the less would be the out of sight loss, and hence there could not be any possible damage to appellees. This sounds entirely reasonable and probable, and there is no contrary finding. It is certain that the insurance companies could not be harmed by such procedure, because whatever increase might appear by reason of greater total in amount of damage on the salvaged

merchandise, would be equalized by decrease in claim for out of sight loss. Certainly the adoption of this procedure pursuant to an understanding, or even a belief of an understanding, with the agents of appellees cannot, by any stretch of the imagination, be deemed fraudulent.

A fair consideration of the evidence shows that in preparing his proofs of loss plaintiff acted in good faith and the agents upon whom he relied acted in good faith. Appellant did not attempt, and there was no necessity for him to attempt to avoid responsibility for any over-valuation in his proofs of loss.

We respectfully submit, moreover, that even if there was over-valuation known to appellant's agents, the trial court erred in concluding, as a matter of law, that such knowledge would be imputed to appellant. So far as we have found, this point has not been passed upon in the State of California, or in the Ninth Circuit. Elsewhere there are authorities both ways.

Reason and justice support a conclusion contrary to that reached by the trial court. What we believe to be the correct conclusion is reached and stated as follows:

> "Forfeitures are not regarded with favor."
> 21 *C. J.* 100.

> "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."
> Sec. 1442 *Civil Code of California.*

The statutory form policies provide that they shall be void—(b) "in case of any fraud or false swearing by the *insured*" (italics ours). Strict construction of this condition, in order to prevent a forfeiture, does not permit of its extention beyond the act of the insured personally, unless he knowingly acquiesced in the act of others.

The language of the dissenting judges in the case of *Mick v. Corporation of Royal Exchange Assurance,* 91 Atl. 102, 52 L. N. S. 1074 (N. J.) is potent and inescapable and should be adopted as the law by this court. We quote a portion of the dissenting opinion therein as follows:

> "If false vouchers were produced without the respondent's fraud, the most he can be charged with is negligence (which is not made a ground for forfeiture in this policy), unless such a forfeiture clause, properly construed, penalizes him for the fraud of another. This brings us to the established canon for the construction of forfeiture clauses in contracts. Such clause in the contract before us is in these words: 'This entire policy shall be void in case of fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss.'
>
> The natural construction of the words 'fraud or false swearing by the insured' under the *maxim noscitur a sociis,* is that, as false swearing must be the act of the insured, so the fraud referred to must also be his act, i. e. a fraud perpetrated by him, or with his consent, or to his knowledge, Carson v. Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584.

> This, if it be not the necessary construction, is at least a permissible construction, which is all that is required by the canon stated, viz: that the language of a forfeiture is to be constructed as favorably to the party whose property is to be forfeited as is consistent with the fair principles of interpretation; and surely no one will contend that the interpretation of associated words according to the *maxim a sociis* is not a fair principle of interpretation. The notion that this established canon of construction does not apply to a contract of insurance because the policy is in standard form has no foundation in law or reason. As was said by this court in Hampton v. Hartford F. Ins. Co., 65 N. J. L. 267, 52 L. R. A. 344, 47 A. 434: 'The court will never seek a construction of a forfeiture clause which will sustain it, if one which will defeat it is reasonably deducible from the terms or words used to express it.' "
>
> *Mick v. Corporation of Royal Exchange Assur.* 91 Atl. 102, 52 L. N. S. 1074 (dissenting opinion.)

The language above quoted presents a just rule of law and there is other authority to the same effect.

Metgzer v. Manchester F. Assurance Co., 102 Mich. 334, 63 N. W. 650;

Boston Marine Ins. Co. v. Scales, 101 Tenn. 628, 49 S. W. 743, 746.

For the foregoing reasons appellant's assignment of error XCI should be sustained on account of error in fact by the trial court and also for error in law which would impose a forfeiture upon appellant for

acts of his agents, which, if they were fraudulent, were fraudulent without his knowledge.

THE FIFTH ERROR RELIED UPON.

THE COURT ERRED IN CONSIDERING THE SUSPICIOUS CIRCUMSTANCES SURROUNDING THE FIRE IN CONNECTION WITH THE ALLEGED FRAUD AND FALSE SWEARING. (Assignments of Error LXXXVI, LXXXVII and LXXXVIII, V. VI, p. 3411.)

Summary: There is no charge or imputation that appellant set the fire or had guilty knowledge thereof, therefore, any suspicious circumstances surrounding the fire cannot possibly be of any weight against appellant; however, the trial court states that it did consider these circumstances against appellant, consequently it committed prejudicial error.

ARGUMENT.

The fifth error relied upon is based upon the following assignments of error:

"LXXXVI.

> The court erred in finding that the suspicious circumstances surrounding said fire of October 19, 1929, in plaintiff's factory, may be considered in connection with the defense of fraud and false swearing as to values where the estimate of value in the claim of loss is grossly excessive." (V. VI, p. 3411.)

"LXXXVII.

> The court erred in its conclusion that the suspicious circumstances surrounding said fire of

October 19, 1929, in plaintiff's factory, may be considered in connection with the defense of fraud and false swearing as to values where the estimate of value in the claim of loss is grossly excessive." (V. VI, p. 3411.)

"LXXXVIII.

The court erred in considering and enumerating the alleged suspicious circumstances surrounding said fire of October 19, 1929, in plaintiff's factory." (V. VI, p. 3411.)

These assignments are based upon a recital of evidence pertaining to the fire as appearing in the memorandum opinion (V. I, pp. 176-179), and particularly the following statement of the trial court:

"I have gone into this evidence thus in detail because the suspicious circumstances surrounding the fire may be considered in connection with the defense of fraud and false swearing as to values where the estimate of value in the claim of loss is grossly excessive. Orenstein v. Star Insurance Co., 10 Fed. (2d) 754 (C. C. A. 4)." (V. I, p. 179.)

If there were any suspicious circumstances surrounding the fire, we submit that the trial court committed grave error in holding that they should be considered as any evidence upon the issue of fraud and false swearing, since there was no issue and no claim whatsoever that plaintiff set the fire or had any guilty knowledge thereof. The honorable trial court states:

"It is not an issue in the case, nor is it claimed by defendants that plaintiff set the fire or had

guilty knowledge of the incendiarism. The evidence was introduced to establish that plaintiff knew that the fire was of incendiary origin when he swore to the proofs of loss." (V. I, p. 179.)

If there is no claim or imputation that plaintiff set or had guilty knowledge of the fire, no matter what suspicious circumstances surrounded the fire, they furnish no basis for any criticism of appellant. In order for such circumstances to be considered against appellant, there should be some imputation or suspicion that appellant set the fire or had guilty knowledge thereof. Whatever suspicious circumstances were created by others cannot affect appellant. This seems elementary.

In considering claimed suspicious circumstances against appellant on the question of false swearing the trial court erred. This error to some extent affected the court, otherwise it would not have said such evidence should be considered, and hence the error was prejudicial and requires correction by this court.

THE SIXTH ERROR RELIED UPON.

THE COURT ERRED IN CONSIDERING THAT THE AMOUNT OF INSURANCE CARRIED ON THE STOCK WAS A SUSPICIOUS CIRCUMSTANCE. (Assignment of Error LXXXIV, V. VI, p. 3411.)

Summary: Appellant did not know the amount of insurance he was carrying, the insurance was entirely in charge of Mr. Taylor without interference of plaintiff, and Mr. Taylor procured the insurance car-

ried; an insurance expert testified that it is not unusual for a stock to be overinsured. Hence there is no foundation for the amount of insurance to be deemed a circumstance prejudicial to appellant.

ARGUMENT.

In its memorandum opinion the court states:

> "What might be deemed a further suspicious circumstance is the total amount of insurance carried upon the stock of merchandise. I find that the value of the stock at the time of the fire was approximately $88,000, yet according to plaintiff's own theory of the insurance involved in this suit, he carried insurance on the stock amounting to $185,000."
>
> (V. I, pp. 178-179.)

Under the circumstances in this case, and the evidence as produced, no more unfair and unjustified statement could be made. We submit that the unquestioned evidence in the case shows that the amount of insurance on plaintiff's stock could not possibly be deemed a suspicious circumstance. Plaintiff did not even know the amount of the insurance he was carrying. He had had very little to do with the insurance for years, having left the matter entirely in the hands of Mr. Taylor, and Mr. Taylor attempted to see that the stock was covered by insurance at all times. And it was testified by the insurance expert that where a stock is fluctuating it is not at all unusual for a firm to be overinsured.

To substantiate the foregoing statement, we quote the following portion of the testimony:

Mr. Hyland testified:

"I had nothing whatever to do with carrying of the insurance. That was handled entirely by Mr. Taylor, as I told you before."

(V. I, p. 531.)

He further stated:

"I know nothing whatever about the placing of insurance. Mr. Taylor handled it entirely. I did not interfere with him in any way. The insurance was handled by Mr. Taylor, as I have told you repeatedly."

(V. I, p. 532.)

Again he stated:

"Mr. Taylor had absolutely full scope to insure as he saw fit. It was entirely in his charge, and I had nothing whatever to do with it. Not for many years prior to the fire had I given him any instructions as to insurance. I had told him at the time to just keep covered. I did not check up the amount of insurance premiums that we were paying from time to time prior to the fire. I left that entirely in the hands of Mr. Taylor, except the Marine insurance. Answering your question, 'do I mean by that to state that I did not know on the day of this fire, or on the night of this fire, the amount of insurance we had there', that is a positive fact. I did not. I did not even know approximately. I trusted Mr. Taylor to keep covered, and I left it entirely in his hands and I have never interfered with him."

(V. I, p. 533.)

Mr. Taylor testified:

"I had charge of the insurance for Hyland Bag Company in 1929. Mr. Hyland requested me to take charge of that department somewhere about either 1919 or 1920. Since then I had continually taken charge of the insurance. My instructions were just to see that we were thoroughly covered all the time. That was about the only instruction that I remember. Never once, to my knowledge, in all of the years that I was there did Mr. Hyland interfere with me in what I did in insurance matters. He did not give me any instructions as to kind or classification of insurance that I should place. I think we brought Mr.Hyland in once on Use & Occupation Insurance and once on Marine Insurance. Outside of that I do not remember ever speaking to Mr. Hyland on the insurance question."

(V. III, p. 1413.)

The record shows that on or about September 30, 1920, plaintiff reported to the Western Insurance Company in a report which was prepared by Mr. Taylor, that the values of the stock and merchandise had reached $179,510.52. (V. I, p. 357.) When Mr. Taylor found that the values had run up to this amount, he testified as follows:

"When that report was completed, I got to Mr. Terkelson as fast as I could. We were not covered, and the thing was to get to it as fast as I could get. As to what extent did I realize that the Hyland Bag Co. was not covered as of that date, it would be $115,000 as against $179,-000, about $64,000."

(V. III, p. 1420.)

The report of September 30, 1929, as to values was received by the general agents of the Western Insurance Company of America, as shown by the testimony of Mr. McLaren. (V. III, p. 1131, and V. III, pp. 1132-1133.) Mr. McLaren testified:

> "As to getting a picture there that if they had $200,000, there, they would carry $200,000 of insurance on $179,000 worth of stock. Lots of times things like that happen. Where your stock drops down, and instead of cancelling at short rates, you let it continue until the stock goes up again. I knew that was the purpose of reporting policies, and I knew that the Hyland Bag Company followed the custom of reporting policies, and they realized the convenience of reporting policies."
>
> (V. III, p. 1152.)

And again he said:

> "It frequently occurs that an insured carries over-insurance."
>
> (V. III, p. 1154.)

From the foregoing testimony, it is obviously the fact that the plaintiff did not know the amount of insurance he carried, at the time of the fire. If he was over-insured, or under-insured, he did not know it, and hence a statement of the court as to the insurance being a suspicious circumstance is without any foundation whatsoever.

SEVENTH ERROR RELIED UPON.

THE COURT ERRED IN HOLDING THAT THE FAILURE TO SETTLE THE LOSS BY ARBITRATION WAS DUE TO THE CONDUCT OF PLAINTIFF AND HIS APPRAISER. (Assignments of Error CXIV, CXV, CXVI, CXVII, CXVIII, and CXIX, V. VI, pp. 3418, 3419.)

Summary: Any finding of fact that the failure of an appraisement was due to appellant or the appraiser appointed by him, is contrary to the evidence; the evidence shows that appellant's appraiser did his utmost to secure the appointment of an umpire, and after the ninety days had expired when appellant could bring suit, appellant's appraiser was anxious to have the appraisement brought about; no objection was made to the competency or disinterestedness of appellant's appraiser, and no valid objection existed to him, or if it did exist, it was waived by failure to object; furthermore, appraisement was waived.

ARGUMENT.

The assignments of error which form the basis of the seventh error relied upon are founded upon that portion of the memorandum opinion of the trial court which discusses the attempted appraisal of the fire loss. (V. I, pp. 196-202.) This discussion refers to the special answer of certain of the appellees which alleged that "the appraisement was not had, due to the acts of the plaintiff and the appraiser appointed by him, and this action was commenced before the compliance by the plaintiff with the provisions of each of said policies of insurance regarding the appraisement of the loss." (Opinion, V. I, p. 197; also V. I, pp. 50, 64.)

The said defense of certain of the appellees was based upon a provision of the policies which provided for appraisement. (V. I, pp. 311-312.) The latter portion of said provision states:

> "If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received, by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement."
> (V. I, p. 312.)

Plaintiff's action herein was brought because appraisement was not had or completed within ninety days after the preliminary proof of loss was received by appellees.

The honorable trial court states that "Due to the conduct of plaintiff and his appraisers, this was not done, and this suit was instituted." (V. I, p. 202.) Assuming that the honorable trial court intended by this vague language to find that acts of plaintiff and his appraiser prevented appraisement within ninety days, we respectfully submit that such finding is not supported by the evidence. To illustrate this fact, we review the evidence:

The various appellee insurance companies stipulated to receiving preliminary proofs of loss on December 24 and December 26, 1929. (V. I. p. 395.) Appraisal was demanded by the insurance companies which desired appraisement, by letters dated from January 18, 1930, to January 27, 1930, and William

Maris was appointed their appraiser. (V. I, pp. 398-399, 400, 408.) Appellant appointed Mr. George P. Colbert as his appraiser on January 31, 1930. (V. I, pp. 411-412.)

It is a fair inference from the evidence that Mr. Maris and Mr. Colbert discussed the matter on or before February 4, 1930, because on that day Mr. Maris wrote Colbert concerning the schedules. (V. III, p. 1265.)

On February 7, 1930, Colbert wrote Maris referring to a discussion on an umpire and stated:

> "*In order to expedite matters,* I suggest that you propose the names of six gentlemen whom you think would be satisfactory to act with us in this matter." (Italics ours.)
>
> (V. III, p. 1266.)

On February 13, 1930, Mr. Maris wrote Mr. Colbert and in effect stated that he was at that time too busy to give any attention to this matter. (V. III, pp. 1266-1267.)

On February 19, 1930, Mr. Colbert wrote to Mr. Maris and suggested as umpire William A. Sherman, president of the Fire Commission of San Francisco. (V. III, p. 1268.)

On February 25, 1930, Mr. Maris wrote to Mr. Colbert and objected to Mr. Sherman and suggested various persons to act. (V. III, pp. 1268-1271.)

On March 18, 1930, Mr. Colbert wrote to Mr. Maris and apologized for his delay due to press of business of H. M. Newhall & Co., and stated that while the persons named in Mr. Maris' letter were men of in-

tegrity, he objected to them because of their lack of knowledge of the commodity involved, and he in turn suggested the names of a number of persons, none of whom had any intimation that they were being considered. (V. III, pp. 1270-1273.)

On March 28, 1930, Mr. Maris wrote Mr. Colbert indicating that Colbert had called upon him in the meantime, and objecting to the names proposed by Colbert, and himself suggesting additional names. (V. III, p. 1273.)

On April 5, 1930, Mr. Colbert wrote Mr. Maris suggesting additional names and stating:

> "I am very anxious, if possible, to agree on a satisfactory umpire, if such can be done within the next few days."
>
> (V. III, pp. 1274-1275.)

He also calls attention to the sale of the salvage set for Thursday, April 10th, and added:

> "Don't you think, Mr. Maris, that it would be a good thing to have this loss agreed on by competent appraisers rather than by this method of sale?"

and he also adds:

> "I would be very much disappointed if we cannot get together by next Thursday and close this loss by a proper appraisal."

The ninety days from the stipulated receipt of the last preliminary proof of loss expired on March 25, 1930, and on account of the failure of appraisal, appellant's right to sue accrued at that time. Yet said

letter from Colbert to Maris of April 5, 1930, shows that Mr. Colbert is then desirous and anxious for an appraisal to be had. Whatever occurred from this time on, even the absolute refusal of appellant to thereafter have an appraisal, could not have affected his right of action which had accrued.

It surely must be clear from the foregoing facts that up to April 5, 1930, the failure to have an appraisal was not due to any acts of plaintiff or the appraiser appointed by him.

Although anything subsequent to March 25, 1930, would have no bearing on the right of appellant to sue under the terms of the policy, nevertheless we believe the evidence shows that even the failure of the appraisement thereafter was not in anywise attributable to plaintiff or his appraiser.

The substance of the subsequent correspondence is as follows:

April 9, 1930, a letter from Colbert to Maris stating that he will not agree to Mr. P. J. Seale as umpire. (V. III, p. 1276.)

April 12, 1930, a letter from Mr. Maris to Mr. Colbert stating that he accepted Mr. Alexander Logie as umpire. (Mr. Logie had previously been suggested by Mr. Colbert on March 18, 1930.) The acceptance of Mr. Logie states that he had expressed reluctance to act. (V. III, pp. 1276-1277.)

April 15, 1930, a letter from Mr. Maris to Mr. Colbert stating that Mr. Maris had heard from Mr. Logie that he would not act as umpire, stating that

Mr. Wilson would not act, and suggesting that since he had accepted a name proposed by Mr. Colbert, Mr. Colbert should now accept one of his names.

April 17, 1930, a letter from Mr. Colbert to Mr. Maris suggesting any one of the Judges of the Superior Court would likely serve as umpire. (V. III, pp. 1278-1279.)

April 19, 1930, a letter from Mr. Maris to Mr. Colbert stating that he didn't feel that a Judge of the Superior Court would fill the requirements, and stating that he was going to be gone for two weeks.

April 21, 1930, a letter from Mr. Colbert to Mr. Maris stating that it is regrettable that Mr. Maris is leaving the city at this time, "as I was hoping that we might come to some agreement on an umpire as this matter has dragged now for a long period of time." The letter also suggests that Mr. Maris reconsider certain persons proposed by Mr. Colbert. (V. III, pp. 1279-1281.)

May 21, 1930, a letter from Mr. Maris to Mr. Colbert stating that Mr. Colbert's letter had been received in his absence, and suggesting several firms of accountants as possible umpires.

June 7, 1930, letter from Mr. Maris to Mr. Colbert referring to a telephone conversation in which Mr. Colbert told him that he was informed that suit was about to be brought against the insurance companies and further efforts to agree upon an umpire would be futile. The letter criticizes Mr. Colbert in the matter of selection of an umpire. (V. III, pp. 1283-1284.)

June 17, 1930, a letter from Mr. Colbert to Mr. Maris in which he assails the suggestions in the previous letter of Mr. Maris, and states that the criticism is an "insult to the many prominent, outstanding citizens whose names I submitted to you." This letter also attributes to Mr. Maris the fault for failure to bring about an appraisement. It states that he has learned that Mr. Maris is entirely in the employ of the insurance companies, and has been so for many years. (V. III, p. 1284.)

There was a letter offered, but not admitted in evidence, from Mr. Colbert to Mr. Hyland, dated April 15, 1930 (V. VI, pp. 3246-3248), in which Mr. Colbert reviews his efforts to bring about an appraisement, and states that the entire matter leaves him with but "one thought in mind, and that is that the insurance companies and their representatives are not very desirous of arriving at a fair and unbiased appraisal in this matter." And in the letter Mr. Colbert tendered his resignation as an appraiser.

It is impossible for any reasonable person to read the correspondence referred to and reach the conclusion that the failure to make an appraisement within ninety days after the filing of the preliminary proof of loss was due to any act of appellant or his appraiser. On the contrary, it is apparent that Mr. Colbert, the appraiser appointed by appellant, desired to expedite the appraisement, and was anxious to have it brought about before a sale of the salvaged property.

There are only two other items of evidence on this matter.

Mr. Logie testified that he talked to Mr. Colbert; that he would not consent to act unless there was a clear understanding in regard to two matters; that Mr. Colbert said he was required to consult in regard to that, and later phoned and "told me that I had not better serve". (V. IV, pp. 2161-2162.) Mr. Logie wrote Mr. Maris and declined to act as umpire. (V. IV, p. 2186.)

In its memorandum opinion the court states in reference to the refusal of Mr. Logie to serve:

> "He said that Mr. Colbert approached him and when Colbert discovered that he believed that a substantial out of sight loss was impossible, he (Colbert) suggested that he decline to serve". (V. I, p. 202.)

Such situation *does not appear in the evidence.* On the other hand, it was Mr. Colbert who suggested Mr. Logie's name on March 18, 1930, nearly a month before his name was accepted by Mr. Maris. (V. III, p. 1272.) Mr. Colbert or Mr. Hyland did not call upon him until after Mr. Maris had done so. (V. IV, pp. 2173-2174.) Mr. Hyland never spoke to him on the matter. Mr. Logie would not consent to act unless Mr. Colbert was agreeable to two stipulations. (V. IV, p. 2175; V. IV, p. 2161.) Thus the testimony shows affirmatively, not that Mr. Colbert suggested that Mr. Logie not serve, but rather than Mr. Logie would not serve unless stipulations were agreed to. If one of these stipulations was that there should be

no claim for out of sight loss, then there was good reason why Mr. Logie should not act, for in effect this would amount to prejudging appellant's claim.

The only other evidence claimed to bear on this matter is that Mr. Hyland loaned Mr. Colbert money, and in July, 1929, allowed him commissions on two Newhall contracts and a portion of a Newhall credit memorandum. (V. IV, p. 1729.) It is also stated that it appeared that plaintiff paid Mr. Colbert $250.00 in September 1929, and it is claimed that after the fire Colbert signed, at the request of plaintiff, certain contracts which had no validity and were fictitious.

These various latter items of evidence have no bearing whatsoever on the failure of the appraisers to agree upon an umpire. If they had any bearing on this phase of the case, it would be upon the question of the disinterestedness of Mr. Colbert, but his disinterestedness was not an issue under the pleadings. Even if it were an issue, we do not believe that because prior to the occurrence of the fire Mr. Colbert had received commissions or other moneys from appellant, he would be thereby rendered incompetent to act as a disinterested appraiser within the meaning of these policies of insurance.

These policies provide that each party shall pay the appraiser appointed by him; thus in a sense it is contemplated that each appraiser shall immediately become an employee of the party appointing him. It may be said further, that the payments or moneys received by Mr. Colbert appeared on appellant's

books, were open to examination by appellees, and they never made the slightest objection to Mr. Colbert as an appraiser. Unless appellees objected to Colbert, knowing the situation, disqualification would be waived.

As to the alleged fictitious or cancelled contracts—all the evidence and circumstances on behalf of appellant tend to show they were genuine. The evidence of Colbert that they were fictitious was given under intimation of criminal prosecution. But whether they were genuine or fictitious has absolutely no bearing upon the failure to arrive at an appraisement.

We conclude this matter by repeating that the failure to reach an appraisement within ninety days cannot reasonably be attributed to any acts or conduct of appellant or his appraiser—that in reference to this matter the trial court again demonstrated its antagonistic view toward appellant and argumentatively made a conclusion unjustified by the evidence.

Appraisement Rendered Unnecessary and Impossible and Waived by Auction Sale Consented to by Appellees.

An auction sale of the salvaged merchandise was held on April 22, 1930. This disposition of the salvaged merchandise was at the suggestion and with the approval of Mr. Smith, the adjuster for several of the appellees. (V. I, pp. 385-386.) All appellees were notified and it does not appear that any of them objected to the auction sale. (V. I, pp. 387-388.) Mr. Smith was present a part of the time at the sale. (V. I, p. 998.) He was a bidder for merchandise, but did

not succeed in buying it. (V. I, p. 1001.) The trial court states in its memorandum opinion in reference to the salvaged merchandise:

> "The sale of the entire stock at auction and the delay in holding the sale was apparently consented to by the insurance companies."
>
> (V. I, p. 191.)

The auction sale of the salvaged merchandise fixed its salvage value more definitely than any appraisement could possibly have done, and hence rendered the appraisement unnecessary. Furthermore, the dispersion of the merchandise among its various purchasers rendered appraisement impossible. The appellees consented to this auction sale. Hence it must be held beyond any question of doubt that they waived the requirement of an appraisement.

The law on the waiver of an appraisal is well settled.

> "A provision for arbitration or appraisal, of course, may be waived. And either party waives the right to insist upon such provision by any action inconsistent with reliance thereon."
>
> 26 *C. J.* 429.

The sale of the salvaged merchandise and its dispersion among the buyers thereof was clearly inconsistent with reliance upon an appraisal, and since this sale was consented to by the appellees they waived the appraisement.

Accordingly, on the defense based upon failure of an appraisal, not only does the evidence show that the

failure to make the appraisal within the ninety days after filing the proofs of loss, was not the result of any act of appellant or his appraiser, but the facts also show that the appellees waived an appraisal. In either event appellant had the full right to bring his action, and the defense based upon the failure of appraisal is not sustained.

THE EIGHTH ERROR RELIED UPON.

THE COURT ERRED IN FAILING TO FIND THE AMOUNT OF PLAINTIFF'S LOSS AS REPRESENTED BY UNSALVAGED MERCHANDISE AS DISTINGUISHED FROM SALVAGED MERCHANDISE AND BURNED OUT OF SIGHT MERCHANDISE. (Assignments of Error XCVI, XCVII, XCVIII and XCIX, V. VI, p. 3414.)

Summary: The court found the out of sight loss was approximately $2000.00; in addition to this there was the salvaged merchandise as appeared on the Radford inventory, but there was no finding as to merchandise not burned out of sight, yet rendered unsalvable. If the court intended the $2000.00 allowed for out of sight loss to include unsalvable merchandise, such sum is too small, as appears from accountants' reports and the debris removed; such merchandise was certainly a factor to be determined in appellant's loss; and it was not determined.

ARGUMENT.

The eighth error relied upon pertains to the finding that appellant's out of sight loss was approximately $2000.00, and related findings. The assignments of

error are XCVI, XCVII, XCVIII and XCIX, V. VI, p. 3414, and these are based upon the memorandum opinion discussing this matter (V. I, p. 185 to V. I, p. 191):

There was certain merchandise salvaged from the fire and sold at auction; in addition to this the court found that approximately $2000.00 worth of merchandise was burned out of sight. We believe it cannot be determined from the memorandum opinion that the court intended that this figure of $2000.00 should cover merchandise which was not burned up entirely and yet was not salvable and was hauled out as debris.

The accountants reported that much more merchandise should have been in the factory at the time of the fire than appeared on the Radford inventory, and there was evidence that a large quantity, seventy to eighty tons of debris, was hauled away after the fire. The hauling away of this debris was testified to by disinterested witnesses, who did the hauling, and although the appellees claim there was no debris, such claim has no weight against the positive testimony to the contrary.

The allowance of $2000.00 for merchandise burned out of sight could not include unsalvable merchandise represented by this debris, for such sum would be far too small. In either event the court was in error: the $2000.00 figure is too small if intended to include unsalvable merchandise, and if not intended to include such merchandise, then the value of the un-

salvable merchandise should have been determined in fixing the amount of appellant's loss.

The proof of loss in so far as specific items were concerned, claimed a total loss on only three lot numbers of a total value of $344.60. All totally burned up merchandise, and unsalvable merchandise were, therefore, included under the claim as merchandise totally obliterated or destroyed.

The complete basis of appellant's claims in this regard, to-wit, the accountant's report, the ash, and the debris, has been elsewhere discussed in this brief. It appears that there is absolutely no foundation that these claims were fraudulently built up.

THE NINTH ERROR RELIED UPON.

THE COURT ERRED IN FINDING THAT THE PRICING AND GRADING OF THE MERCHANDISE ON THE RADFORD INVENTORY WAS FRAUDULENTLY PADDED, AND THAT THERE WAS DECEPTION AS TO PRICE OR QUALITY, AND FRAUDULENT MANIPULATIONS OF RECORDS BY PLAINTIFF. (Assignments of Error CIII, CIV, CV, CIX, and CX, V. VI, pp. 3415, 3416 and 3417.)

Summary: Radford made an inventory of the salvaged merchandise; said inventory contained some items which did not exist, and it was priced by direction of Sugarman (adjuster for plaintiff) according to Bemis five-bale price, plus one-half cent per yard. The evidence does not show that plaintiff knew that the inventory was erroneous or that the pricing was made other than in good faith; plaintiff had nothing to do with the records. Hence the evidence does not

sustain any finding that the inventory was fraudulently padded, or that there was deception as to price or quality, or that there was any fraudulent manipulation of the records; moreover, these matters were not within the issues.

ARGUMENT.

The ninth error relied upon is based upon a number of seriously prejudicial statements in the memorandum opinion of the court. Thus the court states that:

> "the close approximation of this figure (the Radford inventory) to the book value supports the view that the plaintiff knew that there was little or no goods burned out of sight, and that he deliberately suppressed the records showing values before the fire of nearly the same amount."
>
> (V. I, p. 188.)

And it is stated:

> "The fraudulent padding commenced with the pricing and grading of this inventory."
>
> (V. I, p. 188.)

It is also stated:

> "There was a deliberate deception as to price."
>
> (V. I, p. 188.)

And the court also stated:

> "I shall discuss two of these duplications because they illustrate the fraudulent manipulation of records by plaintiff * * *"
>
> (V. I, p. 192.)

And the court stated:

> "If the quantity of merchandise claimed to have been obliterated had been in the factory at the time of the fire, the building housing the factory would have been taxed with a load beyond its capacity. This was demonstrated by models of the factory and of baled burlap, etc., which were introduced in evidence by defendants."
>
> (V. I, p. 193.)

These statements of the trial court are not a finding upon an issue in this case, and in fact they are mainly argumentative, yet they are so prejudicial to appellant that we believe they should have very careful consideration. Such consideration demonstrates that the trial court was wholly in error in reference to these matters.

There is No Evidence that Plaintiff Suppressed any Record of Values.

Taylor kept appellant's books. (V. III, p. 1297.) He was in full charge and appellant never had anything to do with the bookkeeping. (V. I, p. 266.) After the fire Mr. Taylor attempted to prepare a memorandum from the remaining stock sheets of the merchandise, and during the course of the trial he was requested to find the memorandum, but was unable to do so. (V. III, pp. 1446-1447.) He had shown this memorandum to Cerf & Cooper, who were making an audit of the books and inventory, and pursuant to instructions of Mr. Hyland "to give them everything I possessed" (V. III, pp. 1447-1448), turned it over to them. This memorandum was among

those papers later Cerf & Cooper refused to return to Mr. Taylor. (V. III, pp. 1448-1449.)

Mr. Hart, of Cerf & Cooper, appeared as a witness for appellees. (V. IV, pp. 2287-2288.) He testified that Mr. Taylor furnished him the summary and a copy was put in evidence. (V. IV, pp. 2290-2291.) Mr. Taylor produced the ledger inventory account. (V. IV, p. 2300.) Mr. Hart admitted that instructions had been given not to return some papers to Mr. Taylor. (V. IV, pp. 2321-2322.) When Mr. Hart, on behalf of appellees, visited the office of Hyland Bag Company for the purpose of examining records, he was given everything he asked with the exception of cutting and manufacturing records (V. V, p. 2406), and as to these he was shown the sheets showing the record of bags actually manufactured from December 17, 1928, to October 19, 1929. (V. V, p. 2403.) Original cutting records were not preserved, and the records shown Mr. Hart were the manufacturing records of Hyland Bag Co. (V. VI, p. 3324.)

In view of the fact that appellees were given full access to appellant's books, that they were furnished everything they asked for, in so far as appellant's books are concerned, the statement of the trial court that appellant deliberately suppressed the records is not only entirely without foundation, but it is absolutely contrary to the evidence and demonstrates the erroneous view which controlled the trial court in making its decision in this case.

There Was No Fraudulent Padding as to Quantity or Grade.

Radford took the inventory of the salvaged merchandise. (V. V, pp. 2503-4.) After the merchandise had been piled in the building he was unable to go ahead and make an inventory and state the correct grade of burlap, he was not an expert in burlap. (V. V, p. 2525.) He was given the assistance of a man named Gus Kraus; they went straight through, and Mr. Kraus would state the grade and count the number of bolts and call the total number of yards in each bolt to him, and he would record it. (V. V, p. 2525.) He demanded prices on the inventoried merchandise from Mr. Taylor. (V. V, p. 2528.) He took the word of Mr. Kraus as to the amount and grade of each lot of burlap. (V. V, pp. 2588, 2591.)

It was a fact that certain merchandise appearing on the Radford inventory was not correctly graded. How this happened is not explained. Since the evidence shows, and the court in effect finds, that Radford was more of an employee of appellees than appellant's (V. I, p. 187; V. V, pp. 2548-9), it would seem that the responsibility for incorrect quantity or grading would rest upon Mr. Radford and upon appellees. Mr. Taylor merely priced the list of merchandise furnished him, and did not check as to whether or not it was actually among the stock on hand in accordance with his books. In any event, it does not appear that appellant had any knowledge whether the property listed was actually on hand or supposed to be on hand; nor does it appear that ap-

pellant had anything to do with determining the quantity or grading, or that he knew the quantity or grade was not correct (V. III, p. 1654), and hence it seems preposterous to state there was any fraudulent padding either as to quantity or grading of merchandise; and it is likewise preposterous to say that there was any fraudulent concealment or deception on the part of appellant in reference thereto.

There Was No Fraudulent Padding as to Price.

It is the testimony of all parties that Mr. Taylor priced the inventory. Radford testified that he delivered the inventory to Taylor and requested him to price it. Sugarman testified that he received the inventory, that he had previously discussed pricing with Smith, adjuster for certain appellees, and he discussed it with appellant, and decided that in accordance with his understanding with Smith the proper basis of pricing was the Bemis 5 bale list plus ½¢ per yard for overhead. Taylor stated that in accordance with instructions from Sugarman, he priced the inventory, or at least intended to price it, on this basis.

As to the basis of pricing, Sugarman testified that it was agreed between him and Smith for appellees that replacement cost plus ½¢ per yard should be used (V. II, p. 980; V. II, p. 1037), and that he told Hyland he thought this should be the Bemis 5 bale price plus ½¢ per yard. (V. II, pp. 981, 1037.) Smith stated that the matter had been discussed and that

he was agreeable to some addition, but that ½¢ was unreasonable, and that what he was given was the Bemis one-bale price plus ½¢. (V. V, pp. 2814, 2816.)

Smith further testified:

> "I indicated to Mr. Sugarman that there would be some allowance made for that overhead over and above the Bemis Bros. price-list."
>
> (V. V, pp. 2822, 2823.)

Mr. Sugarman also testified that if the inventory was over-priced in his view the appellees would not be prejudiced thereby, for the higher the inventory of salvaged merchandise, the less the out of sight loss would be. (V. II, pp. 980, 1025.) Prior to the filing of appellant's proof of loss, Mr. Smith had the inventory as priced by Mr. Taylor, and prior to receiving the priced inventory, he had been in consultation with Bemis Bros. and others concerning prices, and he thought Sugarman was not trying to keep faith with him. (V. V, pp. 2828, 2829.)

It is possible, under the evidence in reference to pricing, that the salvaged merchandise was inventoried at too high a valuation, but if so, it is accountable for on the theory that Mr. Sugarman believed it was being priced in accordance with an agreement with Mr. Smith, and he also believed that if anything was over-priced it was not detrimental to appellees. The evidence shows that the whole matter was thoroughly discussed and there was full knowledge on both sides before the proofs of loss were filed. Under all these circumstances, it cannot be said that

there was any fraudulent deception, or any deception or attempt at deception at all in regard to prices, and it cannot be said that the prices were fraudulently padded.

There Was No Manipulation of the Records by Plaintiff.

The court discusses two claimed duplications in the total amount of stock claimed by plaintiff "because they illustrate the fraudulent manipulation of records by plaintiff, and also show the significance of the employment of a different firm of accountants to build up values on the basis of the Ernst & Ernst inventory." (V. I, p. 192.)

So far as employing another firm than Ernst & Ernst, who had prepared an inventory on May 31, 1929, the record shows that Mr. Sugarman suggested the employment of Hood & Strong, certified public accountants. (V. II, p. 984.) Plaintiff in fact stated to Mr. Sugarman that he would prefer Ernst & Ernst (V. I, p. 551), but Sugarman wanted Hood & Strong, and so plaintiff told him to go ahead. (V. I, p. 551.)

How can any court justly say that any unfavorable reflection should be cast upon appellant by the employment of Hood & Strong under such circumstances?

Mr. Hart, an accountant of the firm of Cerf & Cooper, testified for appellees, and stated that in his opinion certain items in the report relied upon by appellant were duplications. Several accountants testified on behalf of appellant and none of them testified that such items were duplications. The weight of the

evidence, we believe, is that the items were not duplicated. However, for the purpose of the argument at this point, let it be assumed that some items were duplicated. Is there any suggestion in the evidence that appellant had knowledge of such duplications? Is there any suggestion in the testimony of any witness that appellant suggested or directed or had knowledge of an untrue entry in his books, or that he directed any entries therein at all, or that he suggested or solicited any untrue report or statement? The answer to all of these queries is NO. Appellant did not manipulate his books at all, fraudulently or otherwise, and he never suggested to or directed any employee to make any fraudulent or deceptive manipulation thereof. It is to be noted that defendants strenuously opposed the appointment of independent accountants to audit and report on appellant's books during the course of the trial. (V. III, pp. 1296, 1423, 1590.)

Amount Claimed by Plaintiff Would Not Over-tax Factory Building.

The statement of the trial court that if the quantity of merchandise claimed to have been obliterated had been in the factory at the time of the fire, the building would have been taxed with a load beyond its capacity is, of course, most prejudicial to appellant. Yet when analyzed is of no value to this court and is, we believe, without support in the evidence.

Its lack of value for this court rests upon the fact of its indefiniteness and its lack of relevancy to any issue in this case.

The trial court does not indicate to what extent the capacity of the building would be over-taxed, nor what the capacity of the building was. Furthermore, it does not appear whether the building would have been over-taxed beyond its capacity by weight or volume. It likewise is not certain in the court's statement, that it was not referring to the approximations of merchandise which were requested and given in connection with use and occupancy insurance and not connected with this case. (V. I, pp. 488-489; V. II, pp. 555-564.) These statements were mere probabilities and were not intended to represent personal knowledge. (V. II, pp. 562, 564.) As has elsewhere been pointed out, Mr. Taylor prepared a report showing values in the factory on September 30, 1929, amounting to $179,-510.52. (V. I, p. 351.) No one has ever questioned the accuracy or good faith of this report.

The appellant's claim in this case was that the merchandise in his factory on the day of the fire was of a value of $132,947.44. (V. I, p. 12, Complaint; V. I, pp. 250-251.)

Since the building would house merchandise on the 30th day of September of a value of $179,510.50, it is difficult to understand that it would not hold merchandise of the same kind of a value of $132,947.44 on the day of the fire.

It is respectfully submitted, therefore, that not only is the statement of the trial court so indefinite as to be valueless, but it is contrary to the fact.

As to the ninth error relied upon, we conclude that the many prejudicial statements of the trial court

which are herein considered were wholly and utterly without foundation in the evidence. Such statements without substantial basis fully demonstrate the error which controlled the trial court in its decision herein, and require a reversal of the judgment.

THE TENTH ERROR RELIED UPON.

"THE COURT ERRED IN FINDING THAT PLAINTIFF EVER OR AT ALL, REPUDIATED THE ACCURACY OF PLAINTIFF'S BOOKS." (Assignment of Error C, V. VI, p. 3415.)

Summary: The evidence shows that appellant neither affirmed nor repudiated the accuracy of his books; the evidence shows he did not do his own bookkeeping.

ARGUMENT.

The tenth error relied upon is based upon the following paragraph in the memorandum opinion of the trial court:

> "Plaintiff, on the witness stand, devoted most of the first day of the trial to establish the accuracy and completeness of his books. Numerous forms were introduced in evidence which had been devised by him as the careful executive in direct supervision of his business, to follow the materials from receipt through the process of manufacture and sale so that at any time the contents of the factory could be calculated. Subsequently, in the course of the trial plaintiff repudiated the accuracy of these books."
>
> (V. I, p. 186.)

The record shows that appellant made no statement as to the accuracy of his books, nor did he ever repudiate their accuracy. Appellant repeatedly testified that the keeping of the books was entirely in the hands of his bookkeeper, Mr. Taylor. He considered Mr. Taylor competent. He made no claims or representations in reference to his books, but at all times invited their examination by accountants for appellees.

For the convenience of the court, we refer to portions of the record as follows:

Mr. Hyland testified almost at the beginning of the trial:

> "Answering your question as to whether I am and have been personally familiar with the bookkeeping system and with the records maintained by the Hyland Bag Company, I have never at any time had anything whatsoever to do with the bookkeeping. We had an accountant, Mr. George P. Taylor, in whom I had absolute faith and he was given full charge, and I permitted him to run his department. As to being familiar with general conditions, yes. I am and have been familiar with the general system of maintaining records that prevailed in our office—in the Hyland Bag Company—during the year 1929."
>
> (V. I, p. 266.)

> "Your question as to whether we also had a ledger account setting up the goods on hand at both Sacramento and Sansome Streets can be better answered by the accountant. I was not doing my own bookkeeping. That set of books had originally been installed by Klink, Bean & Co. of which Mr. Cooper, now of the firm of Cerf &

Cooper, was the manager. I relied on that set of books being sufficient to take care of our requirements. I was not operating the books personally. That was in full charge of Mr. Taylor. I cannot give you all these details, for I have not got them."

(V. I, pp. 499-500.)

"I personally cannot answer your questions as to whether we at any time produced any of our books for any examination by any representative of any of the insurance companies in this action, for I have not had charge of the books, and I paid no attention to them whatsoever. It is true that I am the sole owner of that business, but I am not the bookkeeper any more than you are the stenographer in your office."

(V. I, p. 500.)

"As to our having an expert accountant, we considered Mr. Taylor to be a very able accountant."

(V. I, p. 514.)

This matter is of little importance in the case, except to show the complete error of the viewpoint under which the trial court was laboring when deciding this case.

IF APPELLANT IS ENTITLED TO RECOVER, WHAT IS THE AMOUNT HE SHOULD RECOVER, AND HOW SHOULD IT BE APPORTIONED?

It is equitably unthinkable that the judgment herein should not be reversed. Assuming such reversal, what disposition should be made of the case?

There is sufficient evidence before this court for a final disposition of the case.

In the first place we respectfully urge that a preponderance of the evidence sustains a finding that appellant had values in his factory of the amount alleged in his complaint herein, and that he should be given judgment in accordance with the prayer of his complaint for $106,992.83, with interest from December 24, 1929, the date of filing proofs of loss (V. I, p. 17); and that said loss be apportioned among the appellees in accordance with the respective amounts of their various policies as set forth in the complaint. A table of the amount of insurance and its apportionment appears at volume I, page 16 of the record. Other tables appear at volume III, pages 1261-3 of the record, and make up Plaintiff's Exhibit 92.

An alternative of the foregoing plan is that the difference between the original Radford inventory and the net proceeds of the salvage sale, which was impliedly found by the trial court be adjudged as appellant's loss on the salvaged merchandise; and to this should be added the out of sight loss found by the trial court to make up appellant's total loss.

The original Bradford inventory was	$86,807.98
The net proceeds of the auction sale was	27,742.32
Loss on salvaged merchandise	$59,065.66
Out of sight loss found by court	2,000.00
Total loss of appellant under this plan	$61,065.66

Such loss of $61,065.66 should then be apportioned ratably among the appellees.

A third plan would be for the court to accept the implied finding of the trial court as to the loss on the salvaged merchandise, to-wit, the sum of $59,065.66, and add thereto the amount first claimed by plaintiff as his out of sight loss, to-wit: $15,645.25, to make appellant's total loss. Thus calculated the amount of the loss would be $74,710.91, and it should be equitably apportioned.

If the court does not wish to adopt either of these or some similar plan to make a final disposition of the case, then a new trial should be granted. In the event the court deems proper to grant a new trial, a limitation of the issues would tend to a speedier disposition of the case.

The trial court made no finding that would relieve National Liberty Insurance Company or Western Insurance Company from a proportion of the liability in the event any of appellees are liable. In the absence of such finding, the whole loss should be ratably proportioned among all the appellees.

CONCLUSION.

There are many other assignments of error in this case besides those considered in the foregoing brief. The failure to discuss them herein is not intended as a waiver thereof by appellant, or that they are deemed of no importance. The fact is that the honorable trial court committed so many errors prejudicial to appellant that all of them cannot be considered without making an already long brief unduly long. The errors which

have been discussed show fully that in reaching its decision the trial court labored under errors of both law and fact and did not reach a just conclusion.

To paraphrase a statement of Dr. Johnson, a charge of fraud and false swearing is the last refuge of the insurance company. Whenever, for any reason, an insurance company does not wish to pay a loss, if it cannot find some technicality such as the failure to file a proof of loss, or the failure to reach an appraisement, it has the fraud and false swearing refuge which is always a dangerous instrument against the insured because errors inevitably occur in every proof of loss of any importance, and because it is an attack on the integrity of the insured.

In this case the companies involved sought their last refuge and before the trial court they had wonderful success. They succeeded in depriving appellant of the large sum to which he was entitled to compensate him for the loss sustained, and they also succeeded in taking from appellant his good name.

It is to be noted that at the time of the fire appellant had a net worth of $325,000.00 to $375,000.00; that his sales averaged over $2,000,000.00 per year, and that he had unusual bank credits indicating that he was a man of good reputation and standing in the community (V. I, p. 547); he was a director and large stockholder in a local banking institution. (V. I, p. 235.) The decision herein reflecting upon the character of appellant has swept away the work of years and inflicted immeasurable injury upon him as a business man.

Appellant asks this court to restore both his good name and his purse to him.

There was and is no fraud in this case. The necessary elements of fraud as an action or defense are lacking.

There was and is no false swearing. The trial court decided against the insurance companies on the first alleged ground of false swearing as to the origin of the fire. Its decision is undoubtedly correct on this point as shown by a number of authorities, and we cite only *Schmultz v. Employees Fire Ins. Co.* (C. C. A. 2d), 76 F. (2d) 119.)

The trial court made no finding on the second alleged defense of false swearing that appellant swore that his loss was $73,601.96, whereas he knew it did not exceed $35,000.00. However the court argues, discusses, and either directly or impliedly finds a number of matters not alleged. The law of false swearing, in California at least, requires that the sworn false statement must not only be false, but it must be knowingly and wilfully false, and no presumption of fraud arises from over-valuation, nor is the burden cast upon the insured to establish that a false statement is not intentionally false. (Supra this brief, p. 23.)

The basis of appellant's claim as set forth in his proof of loss was simply an estimate made by reputable certified public accountants of the amount of stock on hand at the time of the fire. That it was an estimate appeared in the proof of loss itself, and this fact was known to all parties before the proof of loss was filed. Appellant did not have and could not have had per-

sonal knowledge of the amount of his stock, and according to his bookkeeper the records did not disclose accurately the amount. Therefore, the appellant was required to use some estimate, and its use could not constitute false swearing.

The basis of appellant's claim in the complaint herein was another estimate of accountants, arrived at by a more accurate method than that used in the first estimate. This more accurate method was to take the inventory at a particular period and add thereto all purchases and deduct all sales to the date of the fire. This should be absolutely accurate, except for possible errors in the original inventory, and possible errors in omission of purchases or sales or duplications. In this regard appellees did not challenge the method, but they claimed duplications. Even if duplications existed, appellant cannot be charged with them, as false swearing but they are only errors of reputable and able accountants.

Likewise, it is apparent that appellant cannot be held responsible as a matter of false swearing if any errors in the pricing, grading, or counting of the salvaged merchandise occurred. In all except pricing, *appellees themselves participated,* and the pricing was done in accordance with an agreement, or supposed agreement between the adjuster for appellees and the adjuster for appellant; and any over pricing was deemed to be immaterial because it would result in reduction of out of sight loss.

There was no false swearing found within the issues, and if it was intended to be found upon matters not

alleged, it has been demonstrated that such findings are not supported by the evidence. Needless to say, forfeitures based on this defense are not favored. We quote the following:

> "But forfeitures are not favored; and to warrant a court of equity in decreeing forfeiture on such ground, the intentional false swearing must be established by evidence 'clear, unequivocal and convincing'."
>
> *Fidelity Phoenix Fire Ins. Co. v. Benedict Coal Corp.,* 64 F. (2d) 347, 352 (C. C. A. 4th).

The failure to reach an appraisement within ninety days after the filing of the proof of loss was not due to any acts of appellant or the appraiser appointed by him. It does not appear that appellant had anything to do with the matter during this period, and the evidence shows that his appraiser was most anxious to reach an appraisement for a considerable length of time after the ninety day period had passed. There was no objection to appellant's appraiser and an auction sale of the salvaged merchandise was consented to by appellees, and hence appraisement rendered unnecessary or impossible and certainly waived.

Therefore, any defense alleged pertaining to the failure of appraisement was not sustained.

Furthermore, the trial court failed to even substantially comply with the requirements of Equity Rule 70½.

The situation, at present, is this: No defense herein can be or should be sustained; no forfeiture is justified or should be permitted; the appellant should recover a

judgment for his loss. The loss probably lies somewhere in between the amount admitted by appellees and the amount claimed by appellant,—that is somewhere between $35,000.00 and $106,000.00. This amount should be ascertained and apportioned among the various appellees; and appellant prays that the judgment herein be reversed and that such judgment and orders be made as will compensate appellant for his loss and vindicate his honor in this community.

Dated, San Francisco,
March 23, 1936.

Respectfully submitted,
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No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company,

Appellant,

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEE, NATIONAL LIBERTY INSURANCE COMPANY (A CORPORATION).

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellees.

BRIEF FOR APPELLEE, NATIONAL LIBERTY INSURANCE COMPANY (A CORPORATION).

As outlined in the opinion of the District Judge in this case, there were three what we might term

"groups" of insurance companies who are defendants in this action. The first group of companies carried what we can call the "primary" insurance on plaintiff's stock of goods up to $50,000; the second group covered loss on these goods in excess of $50,000 and up to $100,000, and the third, consisting of this appellee, had issued two cover notes totaling $85,000, making a total insurance of $185,000 on plaintiff's stock of goods.

As shown by the pleadings, there was some conflict between the three groups of insurance carriers as to their contribution in the event of loss under the policies, this appellee contending that its insurance was to attach only when goods in excess of $100,000 were on the premises and then only as to such excess. Each group of companies, therefore, was represented at the trial by separate counsel. With respect to the defense that plaintiff is barred from recovering by reason of his fraud and false swearing, the interests of all of the defendant companies are identical, and, as this was the principal defense presented at the trial, the three groups of defendants joined forces in presenting this issue to the trial court. This issue has been determined in favor of the insurance companies, and the court, having found that plaintiff was entitled to no recovery by reason of his fraud and false swearing, had no reason to consider the question of contribution between the companies.

The question now before this court is whether the lower court's judgment that plaintiff be denied recovery by reason of his fraud and false swearing shall

be sustained on appeal. Although, as we have already stated, as to this issue the defendant companies are all acting in unison, it has been deemed advisable by counsel that separate briefs be filed by counsel for the three appellee groups of companies. In so doing we do not believe the result will be to increase the burden of the court in the consideration of this case, and, although there may be some duplication in the three briefs, it is our thought that it might aid the court to have the benefit of the separate viewpoints of the various counsel with respect to this case.

HISTORY OF THE CASE.

The plaintiff, Richard C. Hyland, prior to October 19, 1929, was the sole owner of a bag and burlap business conducted in a small four-story building on Sacramento Street in the City and County of San Francisco, which he held under lease. He had been conducting this business for a number of years prior to that date under the name of "Hyland Bag Company." Shortly prior to the fire he greatly increased his insurance coverage so that on said date he was carrying insurance on his merchandise and stock in the amount of $185,000; $96,000 on furniture, fixtures and equipment, and $120,000 on use and occupancy, a total of $401,000 of insurance. In the evening of October 19, 1929, a fire took place in his premises. This fire was undoubtedly of incendiary origin, it having started in four different places, at which places kerosene or kerosene soaked rags were

found after the fire. (Tr. 1842-44, 1910, 1965, et seq.) Plaintiff was not on the premises at the time of the fire, but arrived there within a few minutes afterwards, and his attention was called to the kerosene and the fact of the four separate fires. This case deals only with the loss on the stock of merchandise the total amount of insurance on which was $185,000, represented by the insurance written by appellees. In due course, plaintiff filed proofs of loss sworn to by him, claiming loss in the sum of $73,601.96. The claim being declined, this suit was brought and, in the original complaint, plaintiff's claim was raised to $76,-498.62. At a later date he filed an amended complaint raising the amount of his loss to $106,992.83. It was on this latter complaint that the case went to trial. In his testimony at the trial plaintiff contended his loss was in the neighborhood of $108,000. The trial below consumed the greater part of three months, there being in the neighborhood of fifty trial days. In addition to the vast amount of testimony, over 200 exhibits were introduced in evidence, which exhibits include among other matters the most important pieces of evidence considered by the lower court. These last mentioned exhibits consisted of photographs, charts, diagrams and a complete model of the building, built to scale, together with models, also built to the same scale, of bales of burlap, machinery, rolls of twine, etc., so that the building, together with all of the machinery and also the insured material was reconstructed before the court. The trial judge also visited the building where the fire had taken place, at a time when such building was in approximately the same condition

as it was immediately following the fire, the only repairs being the replacement of a portion of the floors around the stairways. The condition of the joists, ceilings and walls of the building was the same as it had been immediately following the fire. The court was, therefore, able to see for himself exactly what damage the fire did to the *building*. As a matter of fact, we understand that the building is still in the same condition and could even now be examined by this court. At the close of the testimony, the trial judge listened to nearly four days of argument, following which, after an extended study of the exhibits and transcript of testimony, he prepared his opinion.

Plaintiff was represented in the lower court by very able counsel and was afforded every opportunity by the trial court to prove his innocence of the charges of fraud and false swearing. It has taken appellant four years to bring this case up for hearing before this court, and he does so on a record of some 3500 pages in length. Much of the testimony in the record has reference to the various charts, photographs, models and other exhibits introduced in evidence, and a full and complete picture of the case as presented to the court below cannot be obtained from even a reading of this voluminous record. The photographs taken the morning after the fire by the police department show more clearly than can the testimony of any witness how small the actual fire damage was and how absurd is the claim that hundreds of large bales of tightly wrapped burlap were burned out of sight in the fire. This is also true of the model of

the building, with which it was demonstrated beyond peradventure of a doubt that the material claimed by plaintiff to have been destroyed in the building could not have been contained therein and at the same time permit of the manufacturing operations which were in progress.

Although certain somewhat technical points are made in appellant's brief, the main contention therein seems to be that the evidence is insufficient to support the findings of the lower court. In support of this contention, appellant's brief does little more than refer to a few excerpts from the testimony of plaintiff himself and his own witnesses, and in replying to such a brief we are faced with the necessity, to a certain extent, of analyzing the testimony and pointing out the evidence supporting the lower court's findings. It is a difficult task, in view of the vast amount of evidence, to do this without extending our brief to great lengths. We will endeavor herein, however, to point out the more important and salient features of the evidence which fully support and sustain every finding and statement made by the trial court in his opinion.

THE ERRORS RELIED UPON BY APPELLANT.

Although ten errors are listed in appellant's brief, a number of them really are to the same effect. They can roughly be grouped as follows:

1. Objections to the findings of fact and conclusions of law;

2. The insufficiency of the evidence;

3. That the court erred in holding that the failure to settle the loss by arbitration was due to plaintiff and his appraiser.

We will now proceed to a discussion of these points.

I.

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR SPECIAL FINDINGS.

Counsel contend that the memorandum opinion which was adopted by the District Court as his findings of fact and conclusions of law is not sufficient in the following particulars:

(a) That the findings of fact and conclusions of law are not separately stated;

(b) The opinion (if considered as findings) is discursive, argumentative and indefinite;

(c) The court failed to find on the principal issues of the case, to wit, the amount of appellant's loss and the alleged false swearing in reference thereto;

(d) Many of the findings or purported findings are not within the issues.

The memorandum opinion of the District Court appears in the transcript, pages 174 to 204.

In answering point (a) above, we need merely quote from the decisions of this court.

In *Parker v. St. Sure,* 53 F. (2d) 706, this honorable court stated, at page 709:

> "In these cases (therein cited) the district judge filed an opinion and adopted the same as his findings of fact and conclusions of law. We see no objection to this course. Until the opinion is adopted by the court as its findings of fact and conclusions of law, it is not a part of the record."

In *National Reserve Insurance Co. v. Scudder,* 71 F. (2d) 884, 888, this court considered the exact contention now being made by appellant, and there stated:

> "Error is assigned to the action of the court in denying appellant's motion 'for findings and judgment'. The record discloses that at the time the motion was denied the court entered an order 'that a decree be entered in favor of the plaintiffs as provided in the memorandum opinion this day filed, and that said opinion be and is adopted as the findings of fact and conclusions of law herein'. In discussing this assignment, appellant says: 'The numerous errors made in this memorandum opinion both in regard to the facts and to the irrelevant statements therein, which apparently caused an erroneous conclusion on the part of the trial judge, indicates the danger of allowing memorandum opinions to be substituted for the findings of fact provided by the rules of the court. It is our contention that our motion for findings should have been granted by the court in accordance with Equity Rule 70½. (28 USCA sec. 723.) In any event, we believe the case is one for the appellate court to exercise its full equity jurisdiction and decide the case de

novo in accordance with the equities disclosed by the evidence'.

While Equity Rule 70½ requires that 'the court of first instance shall find the facts specially and state separately its conclusions of law thereon', and a literal compliance therewith would be attended with undoubted advantages to an appellate court and facilitate the presentation and consideration of appeals, we think the mere fact that the findings and conclusions—if sufficiently specific and otherwise in compliance with the rule—are set forth in the court's written opinion and adopted by the court as such findings and conclusions, is not such a violation of the rule as calls for a reversal of the decree."

It is true that the District Court did not place his findings of fact and conclusions of law under separate headings, but we fail to see how the appellant could have suffered any prejudice by the court's failure so to do. The purpose of findings of fact and conclusions of law is to inform the appellate court of the basis upon which the decision below was rendered. We could not conceive of a case where a court had made more clear the facts found by him and the legal conclusion reached as a result thereof. The lower court was careful not only to state the findings of fraud and false swearing in general terms, but went further and pointed out many of the particulars in which the record disclosed such false swearing. The opinion also cites the authorities and the legal principles upon which the decision is based. The lower court's action in adopting his opinion as the findings

of fact and conclusions of law has incorporated into the record in a far more clear and complete way the basis of the decision below than any set of formal findings of fact and conclusions of law could possibly have done. It would have been, indeed, an idle act for the court, after adopting its opinion as the findings, to have proceeded to make formal findings, which would have added nothing to the clear and complete statement of the basis for the decision.

Appellant next complains that the memorandum opinion, if considered as findings of fact, is discursive, argumentative and indefinite. We do not believe counsel is seriously contending that there would be any doubt or uncertainty in the mind of any person reading the memorandum opinion as to what is the basis in fact and in law for the lower court's judgment. Counsel picks out certain informal phrases in the opinion wherein the District Judge explains the basis of his findings and gives his reasons for going into the details of the proof therein. Of course, these particular statements standing alone do not constitute findings, but we fail to see how it can be successfully contended that the District Judge does not make it plain in his opinion that he finds, as a matter of fact, that plaintiff was guilty of false swearing with respect to the amount of the loss claimed by him. The findings must be taken as a whole. Counsel's criticisms of certain isolated phrases wherein the formal language customarily found in findings is not used can form no basis for a claim that the findings should be rejected and the judgment reversed.

If the court in the course of his opinion makes findings which reflect upon the integrity of the plaintiff, the evidence in the case overwhelmingly supports the conclusion reached. Counsel in support of this proposition refers to a statement by Mr. Justice Butler in his dissenting opinion in *Los Angeles Gas and Electric Corporation v. Railroad Commission,* 289 U. S. 287, 327, 53 S. Ct. 637, 652, 77 L. ed. 1180, 1204, where the court says:

> "The command that the trial court 'shall find the facts specially' means at least that the statement shall be definite, concise and complete as distinguished from discursive, argumentative, obscure or fragmentary."

It is difficult to see how findings could have been more definite and more complete than those of the lower court in this case. Counsel may seek to criticize them on the ground that they are not concise, but he can hardly contend that they are argumentative, obscure or fragmentary.

Appellant next complains that the court failed to find upon the principal issue in this case. Counsel's complaint in this behalf is that the court did not make a definite finding as to the actual amount of the loss, but contented himself with finding that plaintiff was guilty of fraud and false swearing in exaggerating and falsifying the amount of his loss. This court has many times announced the rule that findings are only required on such issues as will support the decree.

In *Parker v. St. Sure,* supra, the court, speaking through Circuit Judge Wilbur, stated (53 F. (2d) 708):

> "The rule is well settled, in states where findings are required by law, that it is not necessary to make findings on all defenses wherein findings actually made require a judgment in favor of either party. We do not believe that the Supreme Court intended to extend this rule by Equity Rule No. 70½ so that in every case there must be specific findings upon every issue, regardless of the fact that findings actually made sustain a decree, nor do we believe that it was the intention of the Supreme Court to introduce into equity and admiralty practice the difficulties inherent in the preparation of precise findings upon every material issue involved in the litigation. The rule is evidently intended to advise the courts on appeal of the decision of the trial court as to the material issues. It is obvious that, where the judgment of the trial judge, in determining the controverted issue of fact, is given great weight upon the appeal, in case of conflicting evidence by witnesses who testify in the presence of the judge, the appellate court in exercising its jurisdiction in equity and admiralty cases should be advised of the conclusion of the trial court as to where the truth lies as between witnesses who contradict each other."

The court, having found that the plaintiff was guilty of fraud and false swearing in the proofs of loss, in the pleadings, and in his testimony (R. 203), with respect to the amount of his loss, such finding necessitated a judgment in favor of the defendants, and there was no necessity whatever for any of the other issues to have been decided. As stated above, where the findings made require a judgment in favor

of one party or the other, such findings are sufficient. The court found, with respect to the claim made in the amended complaint and in the testimony of plaintiff that $46,000 worth of merchandise was burned out of sight, that such claim was false and stated that, in his opinion, not over $2000 worth of merchandise was burned out of sight. (R. 185.) He also finds that the prices on the damaged merchandise, which prices were used to make up plaintiff's claim of loss, were fraudulently padded by plaintiff. It was not incumbent upon the court to make a finding with respect to the amount of the loss unless plaintiff was entitled to recover. When we consider that the claim that a large quantity of merchandise was burned out of sight has been found to be false and that the prices used to make up the claim on the damaged merchandise have been fraudulently padded, and when we also consider the testimony of defendants' disinterested witnesses that 75% of the merchandise taken out of the building after the fire was wholly undamaged, the court, if called upon to make a finding as to the actual amount of loss, would, of course, have found it to be an amount far less than the figure given in the proofs of loss. A finding as to the exact amount of the loss, however, was unnecessary under the circumstances.

Appellant seeks to place some reliance on the fact that, in the pleadings of the defendants with respect to the false swearing, the statement was made that the actual loss sustained by plaintiff did not exceed $35,000 and that he knew of that fact when he filed his proofs of loss in a far greater sum. Counsel seems

to argue that, in view of this statement in the pleadings, it was necessary for the court to make a specific finding that the actual loss was less than $35,000 in order to sustain the defense of fraud and false swearing. These pleadings were, of course, filed long prior to the trial and defendants were never fully aware of the extent of the fraud and false swearing on the part of this plaintiff until the close of the trial. Considerable information was developed during the course thereof, and, furthermore, plaintiff swore falsely in his testimony at the trial, which, as we will later show, is sufficient to preclude his recovery. We know of no basis in law which would require a particular finding by the lower court that the amount of the loss was within the estimate made thereof by the defendants in their pleadings in order to sustain the plea of fraud and false swearing. Can it be that counsel is arguing that, if the evidence showed the actual loss was $40,000, which was in excess of the estimate of defendants, plaintiff could recover herein, even though he falsely swore in his proofs of loss that the amount thereof was $73,601.96, and that, in his pleadings and testimony, he falsely swore that the amount thereof was in excess of $106,000? The pleadings raised the issue of false swearing and the case was tried on that theory and the court has found accordingly.

A casual reading of the opinion of the trial court in the case now before this court clearly demonstrates the painstaking care with which the trial judge prepared his opinion in order to carry out the purpose of Equity Rule 70½ to enable this court to properly exercise its appellate jurisdiction. The trial court

discussed the evidence in considerable detail in order that the appellate court would be "advised of the conclusion of the trial court as to where the truth lies as between witnesses who contradict each other".

It would seem that such efforts should be commended as being helpful to the appellate court rather than denounced as making the findings "discursive, argumentative and indefinite".

It appears in the transcript that, in its memorandum and order denying plaintiff's motion for new trial, the trial court stated:

> "In the light of the argument upon the motion for new trial, there are two points in my opinion which I wish to clarify. * * * Second, in order to avoid any possible misunderstanding I find that plaintiff was guilty of wilful and intentional fraud and false swearing in making his proofs of loss." (R. pp. 232, 233.)

The opinion which was adopted as findings of fact and conclusions of law was clearly a sufficient finding on these issues of fraud and false swearing, even without the explanation given in the memorandum on motion for new trial, and such findings are sufficient to support the decree entered by the trial court.

See also:

Western Power Mfg. Co. v. Brewerton Coal Co. (C. C. A. 7), 81 F. (2d) 85, 89;

Standard Oil Co. of California v. McLaughlin (D. C., Cal.), 55 F. (2d) 274, 279;

Briggs v. U. S. A. (C. C. A. 6), 45 F. (2d) 479.

The next complaint is that many of the findings are not within the issues. The claim is that the District Court in finding that the values in the proofs of loss were padded and that there was deception in the prices, etc., was finding on issues outside the pleadings. Appellant does not contend that the defense of fraud and false swearing was not properly raised. Clearly these findings are directly responsive to the issue of fraud and false swearing.

We respectfully assert that the findings of fact and conclusions of law adopted by the trial court were in substantial conformity with equity rule 70½ and are sufficient to enable this court to properly exercise its appellate jurisdiction.

II.

THE ALLEGED INSUFFICIENCY OF THE EVIDENCE.

The second, third, fourth, ninth and tenth errors all fall under the above heading, and we will therefore discuss them herein before passing to the other points in the brief.

The second error relied upon is that the trial court erred in finding that plaintiff was guilty of fraud and false swearing in his proofs of loss and that there was overvaluation which resulted from an intentional fraudulent attempt to get an excessive award from defendant insurance companies, and furthermore any defense of false swearing was waived.

Appellant first calls attention to certain general rules with respect to fraud to the effect that fraud

without injury is never available as a basis of a cause of action. We do not feel it is necessary to meet counsel on this point, as the decisions are without conflict that in an action upon an insurance policy containing provisions such as were contained in these policies, wherein fraud or false swearing by the assured shall void the policy, the proof of such false swearing is sufficient to support the judgment denying recovery. It is unnecessary, therefore, for us to discuss general rules and any fine distinctions between the meaning of "fraud" and "false swearing". The court finds and, as we will later point out, the evidence amply supports such finding, that the plaintiff swore falsely in his proofs of loss, in his pleadings in this action and in his testimony at the trial with respect to the amount of the loss sustained by him in the fire in question. Having found that to be a fact, it follows as a conclusion of law that the policy is void and plaintiff may not recover thereon.

Appellant cites authorities in support of the proposition that, in order to forfeit a policy for fraud or false swearing, such fraud or false swearing must be wilful and not be the result only of inadvertence or mistake. An examination of the opinion of the trial court (see opinion, R. 181-182) shows that the court was well aware of this rule and that his decision is strictly in conformity therewith.

We will now consider the particulars in which appellant claims the evidence was insufficient to support the findings of the District Court.

The main argument on this point is found at pages 25 to 34 of appellant's brief, and is based almost entirely on the proposition that, although the proofs of loss, the pleadings and the testimony of plaintiff may have greatly overvalued and overstated plaintiff's loss, nevertheless it was not shown in the evidence that plaintiff knew of such overvaluation and overstatement or wilfully participated therein. Although it is not stated in so many words in appellant's brief, it seems apparent from a reading of the brief that appellant is now conceding that the proofs of loss, pleadings and testimony were false as to the amount of the loss sustained by plaintiff through the fire in question. He seeks refuge, however, in the claim that he himself was innocent of any wrongdoing and that the overvaluation was the work of his agents. Although, as we will later show, the authorities hold that, in a situation such as we have here, the principal is responsible for the false swearing of his agents, we will at this time discuss various parts of the evidence which support the finding that plaintiff himself knowingly and willingly swore falsely as to the amount of his loss.

Appellant's counsel in the brief points to plaintiff's own testimony to the effect that he was not in active charge of his factory and did not himself keep the books and was not familiar with them, and argues that these statements by plaintiff are conclusive. We might state at this point that the attorney now representing appellant on appeal was not present at the trial in the court below and has not had the advantage possessed by the lower court of listening to Mr. Hyland testify for five or six days in this case. His own

testimony disclosed beyond dispute that he was thoroughly familiar with all phases of his business and personally supervised it in all its details. He spent the greater part of a day describing the types of books and records, card indices, etc., that he had devised himself for the keeping of the books and accounts. He showed that he was most familiar with the amount of stock on hand and with the prices paid therefor. Appellant's argument is that he had a right to rely on the accuracy of his claim, based on the reports made to him by Hood & Strong, certified public accountants, as to the amount of merchandise which, from the records, *should have been* in his factory at the time of the fire, and that he did rely on them and did not know that they were incorrect. In the brief, appellant's counsel ignores the false swearing contained in the amended complaint and in plaintiff's testimony at the trial, and seeks to confine the issue solely to the original proof of loss. Under the authorities, however, false swearing in pleadings and in testimony in an action of this character is sufficient to void the policies.

In *Atlas Assurance Co., Ltd. of London, England v. Hurst* (C. C. A. 8), 11 F. (2d) 250, the court says:

> "The policies contained the following provision: 'This entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss'.
>
> Under such a provision it is well established that a false statement knowingly and wilfully made by the insured of or regarding some matter

material to the insurance, in his proof of loss, at his preliminary examination under oath had under the terms of the policy, *or in his testimony at the trial,* with intent to deceive the insurer, avoids the policy. Clafin et al. v. Commonwealth Ins. Co., 3 S. Ct. 507, 110 U. S. 81, 28 L. Ed. 76; Follett v. Standard F. Ins. Co., 92 A. 956, 77 N. H. 457; Perry v. London Assurance Corporation (C. C. A. 9), 167 F. 902, 93 C. C. A. 302; Columbian Ins. Co. v. Modern Laundry (C. C. A. 8), 277 F. 355, 20 A. L. R. 1159; Huchberger v. Home F. Ins. Co., 5 Biss. 106, 12 Fed. Cas. page 793, No. 6821; Howell v. Hartford F. Ins. Co., 12 Fed. Cas. page 700, No. 6780; notes, 32 L. R. A. (N. S.) 453; 20 A. L. R. 1168, 26 C. J., p. 156, Sec. 191; Id. p. 382, Sec. 492."

In *Columbian Ins. Co. of Indiana v. Modern Laundry, Inc.* (C. C. A. 8), 277 Fed. 355, the syllabus reads:

"Where insured knowingly and willfully makes a false statement as to a material fact in its proof of loss, or in its testimony regarding the value of the property insured, or the loss thereto by fire, the intention to deceive insurer is necessarily implied as the natural consequence of such act, under a policy void if the insured attempts to defraud the insurer."

With respect to the claim of plaintiff that he relied on the reports of his accountants and believed they were correct, the following case is important.

In *Orenstein v. Star Ins. Co.* (C. C. A. 4), 10 F. (2d) 754, the syllabus reads:

"False statements of insured in proofs of loss, being a sworn estimate of value by one having

special knowledge, with intent that insurer, ignorant on the subject, and with unequal means of knowledge, should rely on it to its injury, were not mere matters of opinion, but false swearing, within condition of policy against it."

We will now discuss four particular phases of the evidence which show beyond a doubt that Mr. Hyland knew that the reports upon which he based his proofs of loss and his testimony were incorrect and that he knew when he swore to the amount of his loss that he was doing so falsely. We will discuss this evidence in the following order:

(a) The evidence with respect to the claim that large quantities of burlap were burned out of sight in the fire;

(b) The testimony with respect to the wrongful grading and pricing by plaintiff and his employees of the salvaged merchandise;

(c) The circumstances under which the auditors' reports were prepared;

(d) Evidence showing plaintiff's participation in the procuring of fictitious contracts to pad his loss under his use and occupancy insurance.

Of the amount of loss claimed in the amended complaint, to wit, $106,992.83, $46,000 thereof was for merchandise burned out of sight, that is, reduced to ashes or such minute particles as to be incapable of identification. The testimony of the two fire chiefs, wholly disinterested witnesses (R. 1838 and R. 1891, 1894), shows this to have been what is known as a

"flash" fire, which only burned for a short time and without any considerable amount of heat being generated. It appears that the great bulk of the material claimed to have been burned out of sight consisted of large tightly rolled bales of burlap, each containing 2000 yards of material. It would take over 300 of these large bales to make up the item of $46,000. The evidence further shows that these tightly rolled bales are very difficult to burn and require a great deal of time and heat to consume. (R. 2246.) Mr. Hyland was in and about the building directly after the fire and was there on the following morning when photographs of the fire were taken by the police department. These photographs (Exhibits C, D, E and F) show that loosely piled stacks of cut burlap which were located at the point where the fire was hottest in the building were merely scorched along the cut edges. The fireman further testified that no body of ash was found after the fire sufficient to account for the burning out of sight of any quantity of material. (R. 1837, 1850, 1893.) Mr. Hyland, observing these things, must have known that any such quantity or any considerable quantity of burlap was not burned out of sight in the fire and yet he testified (R. 235) that $46,139.46 of material were obliterated by the fire.

Inquiry was addressed at the trial to the location in the building of this material which it was claimed was wiped out by the fire. None of plaintiff's witnesses were able to point out where in the building such material was located before the fire. Plaintiff's witnesses were finally pinned down to the fact that the greater portion of the baled material which was

claimed to have been burned out of sight was located on the second floor. We might add at this point that the great bulk of the baled material was stored in the basement where there was no fire damage whatsoever. With respect to the fire on the second floor, the fireman who first responded to the alarm testified that he felt the windows on that floor and they were cold (R. 1891 and 1896), and the same witness testified (R. 1896) that the window could not have been cold if there was any considerable fire on that floor. At the trial, with the help of the model prepared by defendants, the building as it existed prior to the fire was reconstructed, and by means of models the machinery and material and stock which were found in the building after the fire were replaced, and thereafter, with the use of models of bales of burlap built to scale, the 300 bales or more representing the obliterated merchandise were placed in the building, which experiment demonstrated that there was not sufficient room therein to accommodate the material claimed to have been there to permit of the carrying on of the manufacturing in progress. Mr. Hyland was, of course, certainly aware of the fact that that quantity of material could not have been accommodated in the building so that, when he swore that that amount was obliterated by the fire, he knew he was swearing falsely. He also was in the building right after the fire and could observe the small amount of burning on the second floor where this material is claimed to have been burned out of sight.

We next turn to the evidence with respect to the prices which were used by plaintiff in making up

the proofs of loss covering the merchandise damaged or destroyed and also to the testimony with respect to the improper grading of the salvaged material. The testimony shows (R. 526 and 532) that Mr. Hyland was thoroughly familiar with the market prices and values of burlap at the time of the fire and that he did substantially all the buying and all the selling for his business (R. 574-575); and the testimony shows, without conflict, that he priced the goods far above the replacement cost to him. At pages 540 to 543 of the record, Mr. Hyland gives the prices used in his proofs of loss, which are shown to be from one and a half to two cents above the actual market cost of such material to him as of the time of the fire. Mr. Hyland's cross-examination with respect to these prices (R. 576 to 584) illustrates clearly his complete knowledge on the question of prices and shows without doubt that he knew he was fixing the prices in his proofs of loss at from one to two cents at the least above the market. In view of the fact that he had been in the business for many years and was one of the most astute and careful buyers of burlap in this vicinity, it is absurd to claim that he did not know of this overvaluation. It also appears from the testimony of defendants' witnesses, Radford and R. V. Smith, and it is even admitted by Mr. Taylor, plaintiff's bookkeeper (R. 1411), that burlap was improperly graded in the proofs of loss in that grades of burlap were listed incorrectly in order to justify a higher price therefor. This is very important in view of the fact that the grading of burlap is something that can only be done by an expert, and the

defendant insurance companies had no means of knowing of this false grading and did not discover the same until a considerable time after the fire. There is a vast quantity of testimony in the record respecting this question of price, and we have not attempted herein to make a detailed analysis of this testimony because we believe it is unnecessary so to do. The testimony of defendants' witnesses with respect to price is practically uncontradicted and is supported by market quotations and by actual contracts introduced in evidence; and the record further shows that it was Mr. Hyland himself who directed the method of pricing the burlap in his proofs of loss, which resulted in the padding thereof as above announced. (R. 981.)

We now turn to the auditor's reports which form the basis of the false and fraudulent claims made by appellant and show, from the circumstances surrounding the preparation of these reports, that plaintiff knew they were incorrect.

It appears from the evidence that plaintiff's bookkeeper kept a so-called "perpetual" inventory or stock-card summary of the goods on hand and that this inventory showed the value of the goods in the factory on the date of the fire to be approximately $88,000. (R. 447, 2290.) There was taken out of the building and identified after the fire $86,000 worth of merchandise. (R. 377.) The above-mentioned perpetual inventory was never produced by plaintiff, although frequent demands for its production were made by counsel for defendants. Unfortunately for

plaintiff, however, plaintiff's bookkeeper directly after the fire had exhibited this inventory to one of the adjusters for one of the insurance companies and a copy of it came into the hands of one of the auditors later employed by one of the insurance companies. (R. 2289.) It also appears that the value of the stock on hand in the factory on the date of the fire, as shown by the books, was approximately $89,000. There were also certain physical inventories taken from time to time. It also appears that on August 5, 1929, only two months before the fire, Hyland had received a report and inventory made as of May 31, 1929, of the books and records of the Hyland Bag Company by Ernst & Ernst, certified public accountants. (R. 255.) In the preparation of the proofs of loss, however, none of the above-mentioned inventories or audits were used. Plaintiff called in a new firm of auditors who had never done any work for him before, to wit, Messrs. Hood & Strong, and delivered to them an inventory dated December 31, 1928, showing the amount of goods on hand at that time, and directed them, using that as a basis, to compute the value of the stock of merchandise on hand at the time of the fire. According to their instructions, however, they were directed to compute this merely by figuring the cost of sales upon the percentage of gross profits of the business for the year 1928. (R. 246.) As the trial court states, this data by means of which Messrs. Hood & Strong were directed to build up the value of the merchandise was "flagrantly insufficient". (R. 190.) Hood & Strong were not informed of the Ernst & Ernst report and

inventory at the time they made their first report and were not furnished with the perpetual inventory or any books and records upon which they could accurately show the amount of this merchandise. Their report built up an inventory as of the date of the fire of $102,453.23, upon which report the proofs of loss were prepared showing a loss of $73,601.96. Nearly a year later, Hood & Strong were requested by plaintiff to prepare another report and were given entirely different data upon which to prepare the same. They were then instructed to take the Ernst & Ernst report showing the inventory on hand as of May 31, 1929, and by means of the record of purchases and sales subsequent to May 31 and down to the date of the fire, to estimate the merchandise on hand in the factory on the latter date. (R. 249.) Utilizing this method, Hood & Strong's second report estimated the value of the merchandise to be $132,947.44, which was a raise of $30,000 over their original report. Plaintiff thereupon filed an amended complaint and alleged the amount of the inventory as $132,947.44 and the amount of the loss as $106,992.83. Messrs. Hood & Strong, in preparing the last-mentioned report, confined themselves to the Ernst & Ernst report as of May 31 and to the books and records of the *Hyland Bag Company* alone with respect to purchases and sales subsequent to that date and prior to the fire. The defendants, however, went further, and through Messrs. Cerf & Cooper, certified public accountants, consulted outside sources, including the persons from whom the alleged purchases which were used to build up the inventory

had been made. (R. 2307.) Among these was H. M. Newhall & Company, a large importer and dealer in burlap. The result of this outside investigation disclosed at once what had happened and also disclosed why it was that the plaintiff employed Hood & Strong to prepare this report rather than Ernst & Ernst. Erasures and alterations (R. 2299) had been made in the books and records of the Hyland Bag Company in order to show that purchases which had, in fact, been made prior to May 31, 1929, and included by Ernst & Ernst in their inventory, were made in June and during the later months, the result being that Messrs. Hood & Strong, not having the working papers and information possessed by Ernst & Ernst, duplicated several large purchases, resulting in an overvaluation in their report of in excess of $30,000. (R. 2305 to 2313.) The erasures on the records of the Hyland Bag Company were plainly apparent at the trial, and it was obvious to the trial court that they had been made for the purpose of hoodwinking Hood & Strong into preparing a report which was erroneous. Counsel for appellant endeavors to hide behind the integrity and standing of the firms of auditors employed by him and would give the impression that the reports of the auditors were made with knowledge of all the facts. This, however, is not the truth, and it was the alteration and the changing of the Hyland Bag Company's books after the Ernst & Ernst report had been made that caused the overvaluation. When we consider that Mr. Hyland was the sole owner of this business and the beneficiary

under the policies of insurance, can we say that he did not have knowledge of these falsifications of his records?

Plaintiff produced among his witnesses Mr. George P. Colbert, an employee of H. M. Newhall and Company. Mr. Colbert was the appraiser who had been selected by Mr. Hyland to appraise the loss pursuant to the demand for appraisal made by several of the insurance companies. Following the investigation of the books of H. M. Newhall and Company, Colbert's employer, which investigation was made by the auditors for the insurance companies, certain discrepancies between the records of the Hyland Company and the Newhall Company were plainly apparent and, in view of the known friendship of Mr. Colbert for Mr. Hyland, suspicion was directed toward him, and, upon his being confronted with the evidence, he confessed to his employer that he had been bribed by Mr. Hyland to deliver to Hyland fictitious contracts upon the stationery of H. M. Newhall and Company in order to permit Hyland to pad his loss under his use and occupancy insurance. He was thereupon recalled for further cross-examination. (R. 1747.) Mr. Colbert testified (R. 1750) as follows with respect to a conversation taking place between himself and Mr. Hyland shortly after the fire:

> "A. The conversation occurred first I think over the telephone, and then later in Mr. Hyland's office.
>
> Q. Who was present at the conversation?
>
> A. Nobody.

Q. You do not mean nobody?

A. I mean Mr. Hyland, I mean no witnesses—I thought that is what you meant—just Mr. Hyland and myself.

* * * * * * *

A. The discussion was brought about in this way, Mr. Hyland asked me—we had done considerable business with Mr. Hyland's firm over a considerable period of years, and had sold a great deal of burlap to Mr. Hyland—and he asked me to have certain contracts prepared which could be cancelled, on which he could predicate the value at which goods could be replaced in making up his proof of loss.

Mr. Thornton. Q. Will you tell us just what conversations there were, and what transpired?

A. Well, the conversation ended there and the quantities, the description of the material, and the prices were left to Mr. Hyland. I furnished him with the blanks to make up the so-called contracts, because I checked the prices at that time, knowing that they were probably in line with what they could be replaced at, and then the matter was through.

Q. Were these contracts made up?

A. The contracts were made up, I did not get any copy of the contracts, and I think there was a letter written by Mr. Hyland to H. M. Newhall & Co., of which he handed me the original, and as these contracts were null and void and had no bearing on the case except price, I destroyed the letter and never put it into the file, because H. M. Newhall & Co. were not interested in it.

Q. Were those contracts signed?

A. Yes.

Q. By whom, what signature appeared upon them?

A. H. M. Newhall & Co. by George C. Colbert.

Q. What became of those contracts?

A. They were left with Mr. Hyland.

Q. Did you, in your capacity with H. M. Newhall & Co., have any authority to sign contracts for H. M. Newhall & Co.?

Mr. Schmulowitz. I object to that on the ground that the authority of the witness or an agent may not be proved out of his own mouth.

The Court. Overruled.

(Exception.)

Mr. Schmulowitz. Furthermore, I object on the ground that it calls for the opinion of the witness.

The Court. Overruled.

(Exception.)

A. No. No contract was supposed to be signed by the head of any department, except by either one member of the firm, either George A. Newhall, Jr., Almer Newhall, or Mr. Harold J. Steele, who is manager of the business—those were the only three people who were authorized to sign any contracts or checks.

Q. Who prepared these contracts?

A. Mr. Hyland prepared them.

Q. Did these contracts actually cover the sale or purchase of the merchandise?

A. No, merely an indication, for which they were given, that certain goods, certain shipments could be replaced at a certain price.

Q. Was there anything said as to these contracts being used for any purpose?

Mr. Schmulowitz. I object to that question, in addition to the other objections, upon the ground that it is leading and suggestive.

The Court. Overruled. (Exception.)

A. Mr. Hyland assured me that these contracts would never be used.

Q. Did you ever report anything about these contracts to Mr. Almer Newhall, or Mr. George A. Newhall, Jr., or Mr. Steele?

A. No, I did not."

The testimony of Mr. Colbert with respect to these contracts was fully borne out by the testimony of Mr. A. M. Newhall of Newhall and Company (R. 2078, 2079), and by that company's records, and it also appears without dispute that these fictitious contracts were used by Mr. Hyland for the purpose of fraudulently padding his loss in connection with his use and occupancy insurance; and it further appears from Mr. Hyland's books that payments for services were made by Hyland to Colbert. If there was nothing else in the record, this testimony alone would shatter completely the claims now made by Hyland's counsel in his brief before this court, that he himself was innocent of any fraud or false swearing. The testimony not only clearly demonstrates the character of man Mr. Hyland is, but shows that he was most active himself in the preparation of the data and evidence which he used to support his fraudulent claims.

Counsel makes complaint of the statement in the court's opinion that the merchandise burned out of sight was the "heart" of plaintiff's claim. As plaintiff presented his claim at the trial, it represented $46,000 of a total amount of $108,000 of his claim. It was therefore a substantial part of his fraudulent

claim. It is also a portion of the claim which the evidence most overwhelmingly shows to have been fraudulent.

The foregoing section of our brief, we believe, disposes of all of appellant's arguments with respect to the sufficiency of the evidence and, if the evidence was sufficient to sustain the court's finding that plaintiff's fraud and false swearing were wilfully made, the authorities cited on pages 44 to 47 of appellant's brief, of course, have no application.

We have only touched a few of the salient points in the testimony herein, but these points that we have dwelt upon, concerning which there is practically no contradiction in the evidence, seem to us to so clearly support the lower court's holding that Hyland wilfully swore falsely with respect to his loss that we do not deem it necessary to burden this court with further repetition of the same character. We will, therefore, now pass to other points made by appellant.

III.

ALTHOUGH THE EVIDENCE SHOWS WITHOUT QUESTION THAT PLAINTIFF HIMSELF PARTICIPATED IN THE MAKING OF FALSE PROOFS AND DID SO WILFULLY, NEVERTHELESS, UNDER THE AUTHORITIES HE WOULD BE RESPONSIBLE IF THEY WERE MADE BY HIS AGENT OR AGENTS.

Plaintiff attempts to escape from the consequence of the false swearing by blaming his agents. He states that the proofs of loss were prepared by Mr. Sugarman, his adjuster, and that the books and records

were kept by Mr. Taylor, his bookkeeper. Although we have shown above that Hyland personally knew of the fraud and false swearing and participated therein, nevertheless, if he claimed that he entrusted the preparation of these proofs and reports to his agents, he must suffer the consequences of false swearing by them.

In *Mick v. Corporation of Royal Exchange Assurance of London, England* (1914, N. J.), 91 Atl. 102, 52 L. R. A. 1074:

> "Where an insurance policy provided that it should become void in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after a loss, and the insured delegated to agents the duty of doing everything required to make complete proof of loss, without question or supervision, held that the act of such agents in presenting false and fraudulent vouchers to the company pursuant to demand was imputable to the insured, and that the policy was vitiated."

In *Saidel v. Union Assur. Soc., Ltd.* (1930, N. H.), 149 Atl. 78, the syllabus reads:

> "Under fire policy providing that it shall be void if insured attempts to defraud company either before or after loss, insured is chargeable with the fraud of his agent while acting in his behalf.
>
> "Intentional overvaluation of property destroyed by fire on part of insured, or agent, in order to have insurer pay full insurance, releases insurer from liability under provision of fire

policy that it shall be void if insured attempts to defraud company before or after loss.

"False statements, recklessly made with conscious indifference as to truth and without caring whether statements are true or false, constitute fraud."

In *Kahn v. Liverpool & London & Globe Ins. Co.* (1925, N. J.), 130 Atl. 436, the syllabus reads:

"Where vouchers were altered after a fire loss to defraud insurance company, it is immaterial whether alteration was by insured or his agent, since a principal cannot take advantage of agent's fraud without assuming responsibility therefor."

The argument contained between pages 48 and 60 of appellant's brief to the effect that Mr. Hyland cannot be held responsible for any false swearing by his agents, we believe, needs no reply, in view of what we have already stated herein. The only authority cited by counsel in support of this argument is from a dissenting opinion in one of the cases above cited by us.

IV.

THERE WAS NO WAIVER OF THE DEFENSE OF FALSE SWEARING.

At page 34 of appellant's brief, the point is made that by reason of the demand for appraisal and the participation in the auction by the insurance adjuster representing some of the companies, the defendants waived the defense of fraud or false swearing.

There is nothing to show that the defendants when they received the proofs of loss had sufficient information upon which to predicate a charge of false swearing. The facts developed from time to time thereafter, and plaintiff more than a year after the fire raised his claim over $30,000, which, of course, could not have been anticipated by the defendants at the earlier date. Waiver is, of course, the voluntary relinquishment of a known right. We submit there is nothing in the testimony to show any waiver by any of the defendant companies. The following authorities treat with the subject of waiver.

In *Couch, Cyclopedia of Insurance Law,* Volume 7, page 5602, it is said:

> "And a provision that false and fraudulent swearing as to loss shall vitiate the policy is not waived by an appraisal, or by an attempt by an adjuster to arbitrate the loss."

Maple Leaf Milling Co. v. Colonial Assurance Co. (Can. 1917), 36 Dom. Law Rep. 202. There action was brought upon a policy of fire insurance, which insured the goods of one Denby in his store. The policy was assigned to the plaintiff subsequent to the fire which caused the loss. The policy contained a condition requiring the insured to furnish an account (proof) of the loss with a statutory declaration that the account was just and true, and another condition providing that any fraud or false statement in the statutory declaration should vitiate the claim. It was found that the statement in the proofs of loss that $2000 worth of goods were destroyed "out of sight" was false, and

was deliberately and purposely made. The plaintiff claimed that such condition (false statement) was waived, first by an appraisement of the loss in which defendant took part, and, secondly, by an arbitration. But there was no actual appraisement, the insurance company adjuster merely denying that any goods had been burned out of sight. The court held that there was no waiver and that the fraudulent claim vitiated the whole claim. The holding of the court was concisely set forth in the syllabus:

> "A false statement by the insured in his statutory declaration as to the loss, by which the actual loss is greatly exaggerated, vitiates the claim under a condition to that effect in the policy; an appraisement of loss, or an endeavour to arbitrate the claim by an adjuster for the insurance company, does not operate as a waiver of, nor could he so waive, the condition."

In *Globe & Rutgers Fire Ins. Co. v. Stallard* (1934), 68 F. (2d) 237, the court, in discussing overvaluation in proofs, says at page 241:

> "It is not correct to say that this overvaluation was immaterial; for the right to recover the full amount of the $4,000 policy was dependent upon showing a value of $8,266.66. And it is no defense to the false swearing, if false swearing it was, that further proofs of loss had been waived by the conduct of the adjuster; * * *."

Aetna Ins. Co. v. Itule (Ariz., 1923), 218 Pac. 990, 25 Ariz. 446. Action was brought upon a policy of fire insurance to recover on account of loss by fire, damag-

ing the furniture and fixtures of a theatre. The insurers declined to pay the loss on the ground that the plaintiffs had violated the insurance contract by incumbering the insured property by a chattel mortgage and by failure to disclose the existence of such mortgage and the nature of their interest in the insured property in their proof of loss. The policy provided it should be void if the personal property insured became subject to or encumbered by a chattel mortgage —also that the policy was void "in the case of any fraud or false swearing by the insured touching any matter relating to this insurance," whether before or after a loss.

Judgment was rendered for plaintiffs who claimed that the forfeiture had been waived by the act of the insurance adjuster in calling for proof of loss and demanding examination of the plaintiffs under oath after the information had come to him of the existence of the mortgage—which the adjuster had learned of after the fire. In reversing the lower court's judgment, the appellate court said, at page 992:

> "In any event, the appellees cannot be heard to base any right upon the action taken by the adjuster upon the faith of their own sworn statement. The agent had a right to assume that the appellees knew whether there was a mortgage still in existence, and also had a right to assume that the appellees were not perjuring themselves. It seems somewhat strange that they should blame the adjuster for either one of these assumptions. It might have been that the mortgage had been paid off and discharged before the fire.

The appearance upon the record of such a mortgage was far from conclusive of its existence at the time of loss, and the agent undoubtedly had the right to take the appellees at their word under oath.

While the law abhors a forfeiture, it must sometimes enforce it. Waiver of a right, even the right of forfeiture, cannot be predicated upon a course of action into which one has been lured by a false statement of those claiming the benefit of the forfeiture. It is elementary that waiver is an intentional relinquishment of a known right. Currie v. Continental Casualty Co., 147 Iowa, 281, 126 N. W. 164, 140 Am. St. Rep. 300."

V.

THE COURT DID NOT ERR IN CONSIDERING THE SUSPICIOUS CIRCUMSTANCES SURROUNDING THE FIRE AND THE EXCESSIVE AMOUNT OF INSURANCE IN PASSING ON THE QUESTION OF THE FRAUD AND FALSE SWEARING.

Counsel has furnished no authority in support of these points, and we believe the matter is amply disposed of by the statements of the trial judge concerning the same in his opinion. (R. 179.)

VI.

THE QUESTION OF ARBITRATION.

As this appellee did not participate in the attempted appraisement, we will leave the argument on this point to counsel for the companies who were involved therein.

CONCLUSION.

In conclusion, we respectfully assert that there is no basis whatsoever for the sustaining of this appeal and that the judgment of the lower court should be affirmed.

Dated, San Francisco,
April 17, 1936.

ORRICK, PALMER & DALQUIST,
Attorneys for Appellee,
National Liberty Insurance
Company (a corporation).

No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

3

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company,

Appellant,

vs.

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Appellees.

BRIEF FOR APPELLEE, WESTERN INSURANCE COMPANY OF AMERICA.

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Subject Index

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BRIEF FOR APPELLEE,
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INTRODUCTION.

We agree with the attorney for the appellant in only one thing, namely, that this case is extraordinary. It can be so characterized not only because of the size of the record and the length of the trial, which started on October 13, 1931, and concluded on January 26, 1932, but also in view of the patience and vision of the trial judge, and the clear and comparatively brief way in which he has expressed the facts which were developed during the many weeks of the trial.

Counsel complains of the bitterness of the opinion because the court sets up in detail the facts upon which it finds that "in order to avoid any possible misunderstanding, I find the plaintiff was guilty of wilful and intentional fraud and false swearing in making his proofs of loss". (Vol. I, p. 233.)

In the preparation of a transcript of this length, it is only natural that due to inadvertence and the tremendous mass of testimony, there should be omissions of matters which may prove to be important. We are stating frankly, at the commencement of this brief, at two places we have quoted statements of the attorney for appellant which support findings of the court, and which will tend to shorten the brief, which must under any condition be fairly lengthy. We would not incorporate these statements if it were not for the attack made by counsel for the appellant on the trial judge, and we shall clearly designate in our brief the instances where we have incorporated such quotations.

Counsel also complains that by the decree appellant has not been able to defraud the various insurance companies, and that there is attached to his name the stigma of being guilty of wilful and intentional fraud and false swearing. These are matters which the appellant should have considered before embarking upon a course of action which would cause a Federal Judge to state:

> "Turning again to the question of fraud, since fraud is never presumed and since a forfeiture should not be decreed unless the evidence clearly warrants it, I have discussed with some detail the evidence which I believe supports my finding that plaintiff was guilty of fraud and false swearing in connection with his proofs of loss, and the pleadings and testimony in this case, and that his conduct has barred his right of recovery herein. I have not, however, discussed all of the evidence which supports my decision but have selected that which best illustrates, in my view the attitude and conduct of the plaintiff. Because of the serious reflection of this decision upon plaintiff, I have reached it reluctantly but feel that it is necessitated by the evidence introduced in the case." (Vol. I, p. 203.)

Counsel has referred to the fact that equity abhors forfeitures. While this is ordinarily true, equity will not refrain from enforcing a forfeiture where the evidence clearly shows the same should be enforced. Counsel also apparently overlooks the maxims that "he who seeks equity must do equity", and "he who seeks equity must come with clean hands".

AS TO THE FACTS.

AS TO THE NATURE OF THE ACTION.

The appellant originally filed proofs of loss claiming a merchandise value on hand at the time of the fire of $102,453.23, with a total loss and damage of $73,601.96. Out of this amount of loss set forth in the proof it was claimed that $15,645.25 represented "merchandise totally destroyed", in other words, "merchandise burned out of sight", as it is referred to in the testimony and in the brief of appellant. (Vol I, p. 423.) Thereafter, on the 19th day of June, 1930, appellant filed and served on appellees a claim that his loss, as a matter of fact, amounted to $76,-498.62. Four days later suit was filed in the Superior Court of the City and County of San Francisco in an attempt to recover this latter amount. The case was removed to the Federal Court and an amended complaint was filed claiming that the loss sustained by reason of the fire was actually $106,992.83. This claim presupposes merchandise totally destroyed or, as stated in Appellant's Exhibit B, "obliterated or out of sight", of a value of $46,139.46. (Vol. I, p. 440.) The appellee, Western Insurance Company of America, denied the claims set forth in the amended complaint, but admitted a value to the stock of a sum not in excess of $75,000, and damage to the property not exceeding $35,000. At the time of admitting that amount of loss this appellee did not have in its possession information developed later which showed that as a matter of fact the loss did not exceed the sum of approximately $10,000.

In addition to these denials this appellee set up a number of affirmative defenses based on the provision of the policy that "this entire policy should be void, * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss." The affirmative defenses pleaded are as follows:

1. That in addition to the provision voiding the policy for fraud and false swearing, it is provided that the insured shall file proofs of loss in which he shall state, among other things, "his knowledge and belief as to the origin of the fire", and that appellant prepared and served upon appellee a proof of loss in which he stated that the fire occurred "which originated from causes unknown to this assured", and that he verified said proofs of loss, stating that the same was true and "that no material fact is withheld that the companies should be advised of." That said instrument was prepared for the purpose of making claim and inducing this appellee to pay a loss under said policy, and that said statements were untrue in that appellant at all times knew that said fire was of incendiary origin.

2. That appellant prepared and served upon appellees proofs of loss claiming that the damage caused by said fire amounted to the sum of $73,601.96, whereas in truth and in fact he well knew that the loss and damage did not exceed the sum of $35,000.

3. That on June 19, 1930, appellant caused to be prepared and served upon appellees a claim that the

loss by reason of said fire amounted to $76,498.62, whereas at all times he well knew that the loss by reason of said fire did not exceed $35,000.

4. That on or about the 23rd day of June, 1930, appellant filed and caused to be served upon appellees a complaint to recover the sum of $76,498.62, whereas at all times he well knew that the loss by reason of said fire did not exceed $35,000.

5. That on the 22nd day of October, 1930, appellant verified, filed and caused to be served upon appellees an amended complaint in the District Court, wherein he sought to recover from appellees the sum of $106,992.83, whereas he well knew that the loss and damage by reason of said fire did not exceed $35,000.

6. That by reason of the terms and conditions of the policy of insurance issued by appellee it did not attach or become binding until the loss exceeded the sum of $50,000 and that there was no insurance effective under the policy of this appellee.

7. That by the terms and conditions of the policy of insurance issued by appellee it was provided that appellant should furnish to appellee a monthly written report showing the maximum liability upon the last business day of the month and that in the event the same should be understated appellee's liability in the event of loss should be diminished by the amount of error, that if the allegations of the amended complaint were true that the value of the property at the time of the fire amounted to $132,947.44, the amount reported to this appellee prior to the loss

was understated in the sum of $30,494.21, and that inasmuch as the maximum claimed by appellant from this appellee amounted to $27,512.44, the amount of the reduction by reason of the understatement would exceed any amount claimed from this appellee, and therefore there was no liability on the part of this appellee under said policy.

AS TO THE INSURANCE CARRIED BY APPELLANT.

At the time of the fire appellant had in his possession policies and cover notes covering the stock aggregating $185,000. Of this sum $12,500 in the Dubuque Fire & Marine Insurance Company, and $5000 in the Minnesota Fire Insurance Company, and $17,500 in the Millers National Insurance Company had been written in April, 1929, $5000 in the Merchants Fire Insurance Company was written in May, $10,000 in the Firemen's Insurance Company was written in June, $50,000 in the Western Insurance Company was written in August, $15,000 in the National Liberty Insurance Company was written in September and $70,000 in the National Liberty Insurance Company written in October. (Appellant's Exhibits 31-39, inclusive.)

In addition to this insurance plaintiff took out $120,000 on use and occupancy, although he had never carried this type of insurance prior to May, 1929. (Vol. I, p. 529.) He also had $96,000 on furniture, fixtures and equipment. (Vol. I, pp. 174-5.) In other words, with the insurance recently placed on this

plant, in the event of a fire resulting in a total loss of its stock and equipment, R. C. Hyland would have collected from the various insurance companies $401,-500. Granting that the values of the machinery and equipment were $96,500 (for we were unable to produce any evidence on this subject at the trial, due to the fact that the property involved was only stock) and taking the figures set forth in Defendant's Exhibit UUU (Vol. V, p. 2723) which figures, by the way, have never been attacked, which show an actual cost to the insured of this stock to be $66,626.05, with a loss of $10,171.92, we find that as against a total value of stock, machinery and equipment of $163,000 appellant would have collected $401,500, or a net profit to him of approximately one quarter of a million dollars.

If we take the statement of the court that "I find that the value of the stock at the time of the fire was approximately $88,000" (Vol. I, p. 178) and add this to the $96,500, representing the machinery and equipment, we would find a total value in the plant of $184,500, which would have left this appellant a profit of $217,000 in the event that this plant was totally destroyed by fire.

Surely, such a situation, when coupled with the evidence which was produced at the trial, would have justified the court in finding that there was a motive and a reason for the incendiary fire which followed.

AS TO THE NATURE OF THE FIRE.

The court has so clearly and briefly set forth the facts in connection with this fire that we shall quote from the findings of Judge Kerrigan. (Vol. I, pp. 175-6-7-8.):

> "Considering the first defense, the evidence clearly shows that this was a 'set' fire and that plaintiff knew it when making his proof of loss. The fire occurred on Saturday evening, October 19, 1929. It had reached sufficient proportions to be detected and the alarm rung by 10:36 o'clock. Plaintiff and his manager of the factory, Miss Mitchell were the only ones in the factory in the late afternoon; they were there continuously until they left at about six-thirty except for an hour between four and five when plaintiff went for a walk because of a headache. After Miss Mitchell had gone through the factory locking the windows, they locked the factory and went to their homes. Plaintiff was informed of the fire by phone, notified Miss Mitchell and returned with her to the factory about eleven P. M. The fire lasted but a short time after the alarm was responded to according to the fire department officials in charge of extinguishing it. The following morning plaintiff returned to the factory as did the representatives of the fire department, the police department and fire patrol. Because the fire had apparently started in several different places and because of a prevailing smell of kerosene, the fire patrol and the police department were investigating a charge of incendiarism. Plaintiff was advised of this and asked who might have set the fire. He suggested three discharged employees who might have grievances

against him. His attention was directed to the various suspicious circumstances which I shall mention.

The witnesses testifying to the circumstances surrounding the fire are of two groups—the chiefs of the fire department in charge of fighting the fire and the men in charge of the fire patrol. Plaintiff has vigorously attacked the credibility of the latter witnesses on the ground of bias and interest. Their positions are created by law but their salaries are paid by the Underwriters' Fire Patrol of San Francisco. It is their duty to keep down loss by protecting stocks of goods from water damage and to investigate fires which are apparently of incendiary origin. The testimony of these men has, on so many material points, been corroborated by the fire chiefs, who are entirely disinterested witnesses, that I do not believe that their credibility has been shaken. The circumstances testified to show that there were four separate and distinct fires. In all but one of them there was evidence that kerosene had been used to start them. One fire originated on the first floor in back of the office and spread to the mezzanine. The fire started in a pile of burlap bags which had been soaked in kerosene. The kerosene had seeped through the floor and had soaked into bales of burlap directly under this in the basement. The principal fire was in the stair well and started on the second floor. This fire was entirely separate from the one just described. It was some thirty feet away and the door leading from the first floor to the stair well had been closed. There was no burning between. The type and depth of the burning of wood in the stair well indicated that it was a

'flash' fire or gas fire such as would result from the burning of the volatile gas kerosene gives off. The stairwell showed little or no evidence of burning between the first and second floors. On the second floor just outside the stairwell, near the open door leading to it, was a shallow pan of kerosene with cut pieces of burlap soaked in it. Another pan of kerosene was found on the same floor about sixteen feet away. There was another fire on the second floor in some *bails* of burlap across the room from the stairwell fire. Its origin was unexplained and there was no burning between the fires. On the third floor apparently another fire had been started near the stairwell. There was a drum of kerosene in which a hole had been punctured near the bottom standing by the door to the stairwell. Some oil seeped out, but as the cap had not been removed from the top, it did not flow freely and became 'air bound'. On this same floor there was another drum of kerosene on its side with several holes punctured about three inches from the floor. The kerosene had saturated the floor nearby for a distance of four or five feet. The fire did not reach this location. The fire in the stairwell burned up into the fourth floor where it mushroomed to the ceiling and burned through to the roof. Significantly, the pans filled with kerosene and rags did not belong where they were found, but belonged under certain machinery and the drums of kerosene had been dragged up from the basement. That the incendiarist was an amateur was shown by his leaving the caps on the drums and by his failing to open the windows and thus feed the fire with the necessary ogygen."

In this connection it is interesting to note that not only does the testimony show, without contradiction, that there was very little damage to the building, but also the court visited this building and had the opportunity of seeing conditions at first hand. Judge Kerrigan went over this building from roof to basement. (Vol. IV, pp. 1731-1746.) He saw the type of construction, the fact that much of the wood was oil-soaked, but unburned. He saw that lint and fibre, resulting from the manufacturing process still remained, also unburned. He saw that the fire had not been of sufficient intensity to even burn splinters and "furring" of the wooden beams.

In regard to the machinery, the court had not only the testimony of Arthur Langrock, an employee of the Pacific Diamond H Bag Company, who removed this machinery to, and installed it in the plant of the latter company, that there was no fire damage to the machinery (Vol. IV, pp. 2075-2077), but also the court visited the premises of the Pacific Diamond H Bag Company and personally saw this machinery and its condition.

Photographs were taken by the Police Department showing the conditions in the plant and the extent of the damage to the stock.

The evidence is uncontradicted that this was a flash fire. R. V. Smith states:

> "Well, this was a flash fire, and it seemed to me as though it just hit the edges of these piles, here, the first four or five piles, and the edges near the fire had been singed, and that was very noticeable, because there was just a certain height

that this flash had hit the piles, and it had not been of long duration, because the lower part of the piles were not burned at all." (Vol. V, p. 2680.)

Fire Marshal Kelly states:

"No, the casing of the stair well was not entirely consumed, it was not, I would consider that that was burned, with what we would classify a flash fire. The evidence there showed it had been a flash fire, for the reason that the amount of the tongue-and-groove surrounding the partition of the stair well was burned to such an extent that there had to be some fuel burned beyond recognition to create that amount of burned vapor without the burned material burning." (Vol. IV, pp. 1967-8.)

These witnesses, and many others, testify as to the separate fires and as to the use of kerosene. We shall not quote the testimony at length as there is no contradiction of it.

Fire Marshal Kelly also tells of his interviews with Mr. Hyland and Mr. Hyland's statements that he suspected three former employees. (Vol. IV, pp. 1983-4-5.)

AS TO THE EXTENT OF THE FIRE.

In addition to the first hand knowledge of the extent of the fire gained by the court in visiting the premises, and in addition to the testimony of the adjusters and various other parties who were in the building after the fire, we have the testimony of the

men who actually fought this fire. Battalion Chief John Mahoney, whose company was situated only two blocks from the scene of the fire (Vol. IV, p. 1890), arrived there within a minute or two. The fire was coming through the roof in the rear, he did not see any fire on the first floor nor could he see any fire through the window of the second floor, where he felt the glass, which was cold. There was some fire on the third floor and there was fire on the fourth floor around the stairway and the skylight. (Vol. IV, pp. 1891-2.) He says that it took them approximately twenty or thirty minutes to get this fire under control. (Vol. IV, p. 1892.) He stayed on this floor for a while after the fire was out, looking for any signs of fire, and overhauling the stock and they were back at the fire house at 11:55, a period of one hour and seventeen minutes. (Vol. IV, p. 1893.)

Battalion Chief Edward D. O'Neill was all over this building the night of the fire and describes the conditions. In describing the fire on the third floor he states:

> "As to how long was it from the time that I got there until we had the fire under control (not overhauled), but under control and started to send the companies home, the principal fire, we got it out so fast it was not twenty minutes that they were working, and you could say twenty minutes on the top floor, for the last place of living fire, or visible fire, fifteen minutes on the third floor, less than ten minutes on the second floor, and possibly three-quarters of an hour on the mezzanine and first floor." (Vol. IV, pp. 1835-6.)

This chief was familiar with fires of this sort, having taken part in fighting the fire at the Pacific Bag Factory where it took them eighteen hours to overhaul a fire in a similar stock, and where they kept a line on the fire for a week, and having fought the Nottson Factory fire, where it took them eleven hours to overhaul and kept a line on for fourteen hours thereafter. (Vol. IV, p. 1848.)

As to the Hyland fire, he states:

> "As to what was the damage that was caused by that fire, well, with the occupancy of that particular building, we would say it was a small loss, that it was rapidly extinguished, in fact, we prided ourselves on the stopping of that particular fire; on coming in on the alarm of the fire we thought we would lose the building, and then it was just a question of confining the fire, and then we found out in a short period of time that this fire was under control, so we were congratulating ourselves on our work as firemen, self-praise, as it were, and it was followed up by the chief of the department in lauding everybody that had taken part in the fire. It was the fastest stopped fire that I have ever seen in my life in an occupancy of that sort." (Vol. IV, pp. 1849-50.)

The testimony of W. D. Gardner shows that as a matter of fact the thread was not even burned off the machines on the fourth floor, except on the first three machines closest to the fire. As a matter of fact, this thread was not discolored. (Vol. V, p. 2452.)

This witness also testified that the rolls on the presses on the third floor had not started to run.

These rolls are made of glue and glycerin and are so sensitive that in the valleys of California these rolls would melt down due to heat in the summer. The witness demonstrated that these rolls would blister after having water applied to them, and made a demonstration in court. He also testified how rolls would sag at a temperature of 110 to 120 degrees, but that the rolls on the third floor had not started to run. (Vol. V, pp. 2458-60.)

AS TO THE VALUES AT THE HYLAND PLANT.

It will be remembered that in addition to the factory at 243 Sacramento Street, where the fire occurred, appellant also had a warehouse at 1328 to 1340 Sansome Street. Nowhere in the books or records of the appellant is there any segregation showing values at the Sacramento plant or at the Sansome Street warehouse. *However, as we shall point out to the court, there is absolutely clear and convincing proof that the value at Sacramento Street must have been less than $90,000.*

The books show a total valuation at both places amounting to $153,056.36. While there is considerable testimony to support this, we are satisfied to refer only to the stipulation as to this figure. (Vol. III, p. 1528.)

The book inventory at Sansome Street as of October 19, 1929, the date of the fire, as shown by Hood & Strong, was $64,074.33. This is $401.56 greater than is shown by an actual physical inventory taken at

the warehouse following the fire. This inventory taken by Mr. Taylor and Ledgett, showed a value at Sansome Street on October 19 of $63,672.77. (Vol. I, p. 253.) Deducting the physical inventory at Sansome Street from the total valuation at both places, we find that the value at Sacramento Street, as shown by the books, amounted to $89,383.59. If we deduct the book inventory at Sansome Street as of October 19, we find that the book inventory at Sacramento Street on the date of the fire amounted to $88,982.03.

This figure is very important as it differs by only $709.48 from the "perpetual inventory" kept by Taylor, and by only $2165.72 from the inventory taken by Radford at Sacramento Street after the fire, and incorporated in the proof of loss sworn to by appellant showing a value at Sacramento Street of $86,-816.31. This discrepancy of $2165.72 shown in the Radford inventory is more than accounted for by increases in the quality of the burlap, which will be shown later, and which are admitted by appellant.

These figures as to values are shown by a "perpetual inventory", or "summary of stock sheets", as appellant prefers to call it. True, Mr. Taylor, the bookkeeper for appellant, denies that he ever had such a document, but he admits he did make up a summary in November or December, 1929, for his own use. Appellant admits that Taylor did keep a perpetual inventory. (Vol. I, pp. 447 and 499.)

Rosslow, the accountant representing Ernst & Ernst, and a witness most reluctant to give any testi-

mony favorable to appellees, admitted that he had seen and checked such a perpetual inventory in June of 1929.

"As to knowing that the Hyland Bag Company maintained, with regard to burlap, a perpetual inventory, with lot numbers, and showing the amount used, so that they could, from time to time, tell how much of each of the lot numbers was on hand, each of the materials represented by the various lot numbers was on hand, I believe they did. *That is right, answering your question 'And you saw that at the time you were going through their books'.*" (Italics ours.) (Vol. II, p. 887.)

"Mr. Palmer. Now, give us the work sheets on the perpetual record, please—the so-called stores on hand, the perpetual inventory account. They kept one; you have stated here two or three times that they kept one. I want to see what your work sheets show on that.

A. As I recall that, I would check to their record.

Q. But have you the data on that?

A. I don't believe I would have such data.

Q. I would like any reference to that account, please what have you there, Mr. Rosslow?

A. This is a summary inventory prepared by Mr. Taylor.

Q. Might I see that, please? This was given you at the time you were making this audit, was it, by Mr. Taylor?

A. Yes.

Q. And purports to represent what?

A. *It is a recapitulation of the inventory, according to Mr. Taylor.*

Q. *Of his inventory?*

A. *Yes.*

Q. *His perpetual inventory?*

A. *I don't know whether he kept a perpetual inventory or not.*

Q. *Well, he kept an inventory of which this is a recapitulation?*

A. *That is right.*

Q. *In his books?*

A. *Yes.*

The set of sheets identified by the witness called 'Inventory, Hyland Bag Company, May 31, 1929' consisting of one sheet in longhand and attached thereto three sheets in typewriting with certain pencil notations thereon, was marked 'Defendants' Exhibit L for identification'.

That particular compilation that has just been introduced for identification would not be shown in that much detail by the ledger, but the ledger would agree in the total. Yes, the detail comes from some other record. That is right, kept by Mr. Taylor. Yes, as I recall it, *I must have seen this other record or account, because I checked to this—certain pages or certain lot numbers. That is right, Mr. Taylor kept another account in more detail on the question of inventory than would appear in the ledger. It is the account from which this material contained in Defendants' Exhibit L for identification came from, that is right.*" (Italics ours.) (Vol. II, pp. 893-4-5.)

"That is right, this inventory of work sheets on the inventory of May 31, 1929, furnished me by Mr. Taylor 'is supposed to be the detail of a perpetual inventory kept by Mr. Taylor'." (Vol. II, p. 898.)

"Oh, yes, I show to the yard in my inventory. Yes this summary that Mr. Taylor furnished me shows to the yard, but I do not know that he has sheets for making up the yardage of this. Correct, I checked this against my inventory. And found it absolutely correct. That is right, to the bale, to the yard, and to the bag.

Mr. Thornton. So even if it were not intended as a perpetual inventory as to quantities, it was at least correct, was it not?

A. It was correct as far as other than raw materials; I don't know that it existed for raw materials.

Q. You did not check invoices?

A. Oh, yes, I checked invoices.

Q. And you checked your inventory against invoices?

A. Yes.

Q. And you checked your inventory against this inventory?

A. Yes, if that is an inventory.

Q. *Well, whatever it is, you checked your quantities* against invoices and *against this?*

A. *That is right.*

Q. *And found this correct as to your inventory and as to the invoices?*

A. *That is right.*

The Court. What exhibit number is that you are referring to?

Mr. Thornton. *I am referring to Defendants' Exhibit L."* (Italics ours.) (Vol. II, pp. 920-21.)

It is true that Rosslow, after talking to the accountants for Hyland during the recess, attempted to change his testimony relative to this being a per-

petual inventory. The witness Terkelson, called by the National Liberty Insurance Company, also testified as to Taylor's statements relative to this perpetual inventory on cross-examination by Mr. Schmulowitz:

"Q. But you do remember, don't you, that in the middle of June, or shortly after the 1st of June, there having been a delay in the submission of the June 1st report to you, that Mr. Taylor then stated to you that from that time on he would be in a position to give you at a moment's notice the quantity of merchandise, because he was then preparing a perpetual inventory.

A. That is right.

Q. That is correct, is it not?

A. That is right, yes.

Q. So Mr. Taylor stated to you early in June that he was then preparing a perpetual inventory, which had not previously been in existence; is that correct?

A. No. It may be in substance, it depends on how you interpret it. Mr. Taylor said that the accountants were there, I don't know what firm, but he told me at the time that the accountants were there making up an audit of their books, and that when that was completed he would have a perpetual inventory all fixed so that at any time of the day or on any day that I chose, or if they should happen to have a fire, he could always glance at his books and tell me exactly what the values were at every location that the Hyland Bag Company was interested in." (Vol. VI, pp. 2964-65.)

The witness R. V. Smith, who was the adjuster for some of the insurance companies, and who was

very anxious to find values in excess of $100,000 (Vol. V, p. 2801) saw this inventory shortly after the fire (Vol. V, p. 2799), and was assured by Mr. Taylor that it was very accurate.

"He told me that he had an inventory that he kept up to date at all times. I asked him if it was a perpetual inventory, and he told me that it was. I told him that I did not have much confidence in any perpetual inventories, and that I would prefer to have a physical inventory, and that we would make arrangements for the physical inventory, and he assured me that his was practically a physical inventory, because he said it was verified quite recently with the physical condition, kept up to date, and when I asked him if they did not take physical inventories, or if they relied on that entirely for the correction of their books or statements, he said, 'Oh, no, we take physical inventories occasionally'." (Vol. V, pp. 2622-23.)

"And it was with that background of experience that I was prompted to state to Mr. Taylor that I did not have much confidence in perpetual inventories, and Mr. Taylor explained to me that was not a fault with his inventory, that his system had overcome that." (Vol. V, p. 2786.)

"A. He explained that to me this way, you notice there is a lot of broken stuff up in this mezzanine floor——

Q. I know there is some broken stuff, but we may differ as to whether it is a lot, or not.

A. There is a quantity there, and that was the safety valve on his inventory, as he explained to me, any broken lots that was not used up on

that order, instead of going to the basement, it would go back to the mezzanine floor, and then by a check of that they could correct the physical inventory. That is the reason he kept his inventory in such perfect condition, he said." (Vol. V, p. 2787.)

While Smith did not make a copy of that perpetual inventory, he did make a notation of the total shown at the plant, amounting to $88,272.55. This figure was given to him on numerous occasions and was verified to him by Mr. Hyland who obtained it from Mr. Taylor.

"In the office that day when I called Mr. Hyland's attention to the fact that his book inventory or perpetual inventory very nearly proved the correctness of the physical inventory, when it was priced according to his costs—I have here a memorandum of that that I would like to refer to; on the inventory the prices were $86,816.31; and their book inventory or their perpetual inventory, as the figures were finally given to me, were $88,272.55. That figure had been given to me numerous times. This particular memorandum I made on a pad that day in the office while I was talking, during this conversation I have just related. Mr. Hyland said, 'I think you are mistaken about that, the values are $102,000, the book values are $102,000'. I said, 'No, you never had any such value as that, that is built up by the Hood & Strong method of applying the cost of sales'. I said, 'That has nothing to do with the actual merchandise, that is a fictitious value'. I said, 'Your book value, according to your own books, is $88,272.55, and that is predicated on your cost of merchandise'. I said,

'If you would take your inventory and price it correctly your values would be just the same as you would have if you had priced a physical inventory correctly'. He said, 'You are mistaken about that, Mr. Smith'. I said, 'You call Mr. Taylor and he will tell you that is correct'. So he called Mr. Taylor, and Mr. Taylor gave him this figure, and Mr. Hyland repeated it to me, $88,272.55. I just kept this memorandum as a reminder of that conversation.

I wrote it down as he gave it to me right there. I had it before me while we were discussing the loss." (Vol. V, pp. 2757-8.)

This perpetual inventory was also seen by R. B. Radford, who was employed by R. V. Smith and appellant to remove the merchandise from Sacramento Street, and as to whose activities we shall have more to say later.

"* * * I had a conversation with Mr. Taylor, and I believe, Mr. Ledgett, also, and they stated to me that they had on hand a perpetual inventory, or the stock sheets showing them at all times just what merchandise there was on hand, and they went into detail to explain to me how the merchandise was received, and how it was tagged and accounted for. Yes, I did say they informed me that each bag was tagged. Yes, I did find such tags on the various bales." (Vol. V, p. 2505.)

"As to, did I do anything in the way of checking or attempting to check this inventory, well, we did after the inventory, we checked and rechecked it about once a day, I would say at least I rechecked it possibly four or five times. Yes, I

did make 'any check of any kind with any employes of the Hyland Bag Company'. With Mr. Taylor. Mr. Taylor said that it was accurate with this exception, that there were a few bags that could not be accounted for, but did not amount to very much, he did not tell me the number, also that I had some merchandise in my inventory that they did not carry on theirs. He did not point out to me what that merchandise was—he did not point it out to me, but said they did not carry the bale covers on theirs, and possibly some wire in the basement." (Vol. V, pp. 2530-31.)

Mr. Taylor also told Smith he had checked with Radford and the latter's inventory checked with his records.

Warner W. Grove, who was the adjuster for the National Liberty Insurance Company, and not for this appellee, also saw this perpetual inventory and when he found that the actual values at Sacramento Street were below $100,000 he wrote the letter, which is Exhibit 61, denying liability on behalf of the National Liberty. He states:

"We were talking about the question of values, and I wanted to get some idea as to the extent of the stock values; there were preliminary questions I had put without much result, but at the end of the first or the second day I was told that the stock values approximated $90,000. Mr. Taylor told me that. I asked him what evidence he had to indicate that value, and he referred me to what he called a perpetual inventory, and I merely glanced at it and verified the fact that it contained figures of substantially $90,000." (Vol. V, pp. 2876-77.)

The only attempt that we find to contradict these witnesses, or impeach their testimony, is through the witness Taylor, who stated that he did make up a summary, but that it was not until November or December, and that it was made for his own purposes. We find, however, that the adjusters and Radford saw this perpetual inventory within a few days after the fire.

This record disappeared, or at least appellant failed to comply with numerous demands to produce the original. Naturally appellant recognized that it was directly contradictory of and a direct challenge to his claim.

Fortunately L. A. Hart, an accountant called by appellees, saw this perpetual inventory and had the foresight to make a copy of the first three pages summarizing the inventory at Sansome Street, the inventory at Sacramento Street, and the inventory of burlap at Sacramento Street, all as of October 19 and 20, 1929. It is indeed fortunate that Mr. Hart made this copy as otherwise we would have no record of this most important document. Mr. Taylor also impressed upon Mr. Hart the perfection of his perpetual inventory records.

> "A. Mr. Taylor, in response to questions that I asked him in December, 1929, relative to the perpetual inventory sheets, advised me that whenever he had occasion to verify them by physical inventories that there was never more than a bale or so difference between the physical inventory so taken and the perpetual inventory records.

> That is correct, 'the perpetual inventory sheet summary that' I am testifying to is Exhibit BBB, 'which shows the total goods on hand of $88,272.55'." (Vol. IV, pp. 2296-7.)
>
> "Yes, Mr. Taylor told me that his stock, so far as his book figures, never varied more than about a bale." (Vol. IV, p. 2319.)

This summary was introduced in evidence and we do not find in the record a single bit of testimony attempting to prove it incorrect. The first page, Defendants' Exhibit AAA, shows an inventory at Sansome Street as of October 20, 1929, of $63,672.77. (Vol. IV, p. 2290.) The second page, Defendant's Exhibit BBB, shows an inventory at Sacramento Street as of October 20, 1929, of $88,272.55. (Vol. IV, p. 2291.) It will be remembered that this is exactly the same figure as referred to by R. V. Smith. The third sheet, Defendant's Exhibit CCC (Vol. IV, p. 2292), breaks down the first item shown on Exhibit BBB of 331 bales of burlap of a value of $49,-267.78, showing the lot numbers, the type of burlap and the number of bales of each kind on hand on October 19th.

It is also interesting to note that we find in appellant's journal entry number 5007, made after the fire and introduced as Exhibit MM, which shows products on hand on October 19th totalling $88,286.55. This journal entry produced from the records of appellant differs by only $14.00 from the perpetual inventory.

AS TO METHOD ADOPTED BY APPELLANT TO SHOW VALUES AT THE SACRAMENTO STREET PLANT.

It will be noted that none of the figures or exhibits relative to the actual values were introduced by plaintiff, but were fortunately available to appellees due to the fact that certain witnesses had displayed the foresight to note, and in some instances copy, these figures.

Appellant first procured the accounting firm of Hood & Strong to make, under date of November 29, 1929, a report showing a purported inventory at Sacramento Street, as of the date of the fire, amounting to $102,453.23. This report was made up by taking the inventory shown on the books as of December 31, 1928, adding purchases, deducting sales, including an arbitrary percentage of gross profit, and deducting the inventory at Sansome Street. Let us bear in mind that this deduction for inventory at Sansome Street is the same figure as is shown on Defendants' Exhibit AAA. (Vol. IV, p. 2290.) To show the fallacy of such a method, let us assume that the fire had occurred at Sansome Street instead of Sacramento Street. We would have found that by this same method Hood & Strong would have built up the same apparent inventory of $166,126 (Vol. I, p. 248) and that they would have deducted therefrom the inventory at Sacramento Street, amounting to $88,272.55. (Vol. IV, p. 2291.) This would have shown an apparent loss at Sansome Street of $77,-853.45, or $14,180.68 in excess of the amount shown by the actual physical inventory taken after the fire.

Appellant at first accepted this figure of Hood & Strong, and incorporated it in the proofs of loss verified by him and served upon each of the insurance companies. He also adopted the Radford inventory as to lot numbers, description and yardage, placing his own prices thereon, and arriving at an inventory value after the fire of $86,907.98. This left him no alternative except to claim that a portion of his loss, amounting to $15,645.25, was represented by "merchandise totally destroyed". (Vol. I, p. 423.) Prior to preparing and filing this proof of loss, he was notified by R. V. Smith, in the presence of W. W. Grove, that his alleged values were not in accordance with the facts, and that if he filed such proofs of loss he would vitiate his policies.

> "* * * I don't recall who were present on that occasion. I think Mr. Grove was present when this was presented. I believe Mr. Hyland was there on that day. And myself. That is all. Just the four of us, I believe. No, I have not heretofore testified to everything that was said upon that occasion, not to everything that was said upon that occasion. We were together quite a bit then, and I would not attempt to cover everything. Yes, I have given you my best recollection as to the subject-matter that was discussed on that occasion. I think that was the occasion, as I recall it, and I think I so testified that that was the occasion on which I brought up the matter, I told Mr. Hyland the thing that I had told Mr. Sugarman, that it would be necessary for them to file a sworn statement, and they would have to swear to the prices, and that if they swore falsely to these they would vitiate their contract.

> Their attitude at that time was, and they said, they would take all the chances on that. Yes, I have already testified to that." (Vol. V, pp. 2832-3.)

After presentation of these proofs of loss, some of the insurance companies denied liability, others demanded appraisal of the loss.

In June of 1930 appellant served on the various insurance companies another instrument whereby he increased his claim to $76,498.62. Suit was then filed in the Superior Court, claiming this amount of loss. When this suit was transferred to the District Court an amended complaint was filed claiming a loss of $106,992.83. This was predicated upon a second report of Hood & Strong, dated more than a year after the fire, and only two days prior to the filing of the amended complaint. This report was introduced as Plaintiff's Exhibit 2.

It is quite apparent that Hood & Strong were willing to follow the instructions of appellant, and build up any kind of claim which he might desire. As we shall point out later, they were forced to admit in court that other reports were erroneous and that they could give no explanation of the errors incorporated therein.

In making this second report of October 21, 1930, they used one of their employees, Frederick W. Rickards, who had nothing to do with the first report of Hood & Strong. (Vol. III, p. 1161.) This report states:

> "Subsequent to the rendition by us of that statement, an examination by your Auditors,

> Messrs. Lybrand, Ross Bros. & Montgomery, disclosed the fact that the accounts from which our statement of November 29, 1929 was prepared had not been adjusted to conform to values determined by physical count to have been on hand, and it was deemed advisable to have us go into the matter thoroughly in order that an accurate statement could be prepared." (Vol. I, p. 250.)

In this connection it is interesting to note that the facts which they claim were disclosed by Messrs. Lybrand, Ross Bros. & Montgomery, were as a matter of fact prepared by one Parker, formerly with that firm, but during all this time in the employ of Hyland. (Vol. III, p. 1230.) The report then further states:

> "Messrs. Ernst & Ernst, Auditors, in their Report to you dated August 5, 1929, certify to the value of merchandise on hand at May 31, 1929. Using this as a basis, auditing the purchase and sale accounts, and ascertaining the actual cost of the material sold plus direct labor applicable thereto from May 31, 1929 to October 19, 1929 (but without inclusion of factory overhead), we have developed the sum of $132,947.44 as being in our opinion a conservative valuation of the merchandise on hand at No. 243 Sacramento Street, at the close of business October 19, 1929." (Vol. I, p. 250.)

It is also interesting to note that Ernst & Ernst did not make a certified audit, but continually refer to their results as a "balance sheet". (Vol. I, pp. 255 and 260.) As Rosslow says:

> "No, I did not make a complete audit of the books, *I made a balance sheet audit.*" (Italics ours.) (Vol. II, p. 892.)

They made no verification of cash disbursements, or a claim set up under other assets, nor did they make any check of goods in process. "We completely verified by physical count all inventory quantities other than goods in process." (Vol. I, p. 257.)

Hood & Strong start their report of October 21, 1930, by accepting the apparent inventory as shown by Ernst & Ernst in their report under date of August 5, 1929, adding a figure which they claim represents purchases from June 1st to the date of the fire, making certain deductions and arriving at an apparent inventory at Sacramento Street and Sansome Street as of October 19, 1929, amounting to $196,620.21. They then deduct the inventory at Sansome Street (as shown on Defendants' Exhibit A (Vol. IV, p. 2271)), amounting to $63,672.77. From this they arrive at an apparent inventory at Sacramento Street as of the date of the fire of $132,947.44. *In other words, it is necessary for appellant now to claim that goods of the value of $46,039.46 were totally destroyed, obliterated or burned out of sight.*

Let us again examine what the result of adopting this system of arriving at an apparent inventory would have meant if the fire had occurred at Sansome Street. By the same methods, Hood & Strong would have arrived at the same apparent inventory, $196,620.21, at both locations. We would have found deducted from this the sum of $88,272.55 (as shown on Exhibit BBB, Vol. IV, p. 2291), which would have left an apparent inventory at Sansome Street amounting to $108,347.66. As a matter of fact, we know that the actual inventory at that location was $63,-

672.77. From such a statement appellant would then have argued that there was merchandise of a value of $44,674.89 burned out of sight, totally destroyed or obliterated. As a matter of fact we know that no such values existed at the Sansome Street location.

Incidentally, it is interesting to note Mr. Rickards' attempted correction of the statements contained in Hood & Strong's report of October 21, 1930.

> "My attention being called to the last line on page 1, in the report of October 21, 1930: 'We have developed the sum of $132,947.44 as being, in our opinion, a conservative valuation of the merchandise on hand at 243 Sacramento street at the close of business October 19, 1929.' No, I did not mean by that statement that I certified that there was that much material on hand positively on that date, that was headed 'Statement of apparent inventory'. Yes, this last sentence, to be correct, should have been, 'appearing to be on hand from our examination of the accounts'.
>
> My attention being called to line 3 in our subsequent report of October 13, 1931: 'The value of the burlap, cotton, and twine in bulk and bags on hand at 243 Sacramento street', yes, I make the same qualification with regard to the use of the words 'on hand', in our figures we always use 'apparent' to show that it is not an actual count." (Vol. III, pp. 1231-32.)

As careful accountants, and knowing that this matter was in litigation, in which the insurance companies were claiming that Mr. Hyland was guilty of fraud and false swearing, Hood & Strong made no investigation to ascertain whether or not physical in-

ventories had been taken subsequent to the Ernst & Ernst report. They did not take into consideration the physical inventories at Sansome Street and at Sacramento Street on September 30, 1929. (Vol. III, pp. 1166-67.)

Mr. Rickards did see the inventory taken at Sansome Street on October 15th, only four days before the fire. (Vol. III, p. 1167.) He stated, in reference to the inventory of October 19, 1929:

> "In order to prove that inventory, that was a physical inventory, and in order to prove that inventory we had another physical inventory on October 15, 1929, and *there could not be any better proof of physical inventories than those taken at different dates, that could be reconciled.*" (Italics ours.) Vol. III, p. 1168.)

Whether or not there was an inventory of October 15th at Sacramento Street, we do not know. It is in evidence, however, that there was in existence at that time a physical inventory of September 30, 1929, showing the merchandise contained at Sacramento Street. Although Mr. Rickards considered that there was no better proof of a physical inventory than another one taken at a different date, he made no inquiries as to this other inventory at Sacramento Street. He knew that there was one at Sansome Street, and was either derelict in his duty, or deliberately misstated the facts when he claims he was not familiar with an inventory of the same date at the plant. If there was no better proof as of that date at Sansome Street, why doesn't the same statement apply to Sacramento Street? Why, with the

knowledge that physical inventories had been taken did not Hood & Strong and their employee, Mr. Rickards, hesitate before putting in their report of October 21, 1930? The only answer is that their interest was in building up an apparent inventory larger than that which actually existed at this plant. As we shall later show, included in the purchases which they state were made between June 1, 1929, and October 19, 1929, are goods which were purchased and delivered prior to that date. Although the information was available to them in the form of contracts and invoices, and although they could have checked the dates of the purchases and deliveries of these goods, they did not do so. Again there could be only one answer and that was they were endeavoring to assist appellant in building up an exorbitant claim. Incidentally, the failure to make these checks and the failure to compare their work with the physical inventories of September 30th and October 15th led them into a ridiculous and most embarrassing situation.

In the early part of the trial, and while appellant was on the stand, there was introduced another report of Hood & Strong under date of October 13, 1931, Plaintiff's Exhibit 30. (Vol. I, p. 288.) This developed an apparent inventory of burlap, cotton and twine at Sacramento Street of a value of $124,728.20. This report was prepared by Rickards. (Vol. III, p. 1176.) He was very evasive relative to the data upon which he had prepared this report and could give us no information relative to the method followed by him.

"As to what I did to convert the item of bags into the yardage figures that I have in Column 7 of our report of October 13, 1931, well, it depends on the size of the bag. No, I did not measure to get the data as to the number of yards in the different sized bags, I got that information from the officials of the Hyland Bag Company, the only source of information one has of getting that information. * * * No, I cannot produce that data for you and have not it in our office. As I say, as I told you before, I believe I simply worked it out on a piece of scrap paper and put so many down and threw it away. I do not believe I did retain the figures from which I translated the bags into yards." (Vol. III, p. 1195.)

He admits that there is a discrepancy of 200,000 yards in burlap alone, and yet, taking the figure that he arrives at from yardage and poundage as being the value of the burlap on hand, and adding an item of some $8000, which is included as other materials, we arrive at the same apparent value of merchandise as is set forth in Hood & Strong's report of October 21, 1930. Hood & Strong either carelessly, or otherwise, or believing that the attorney for the insurance companies would not locate these discrepancies, made no attempt to reconcile these reports.

"Yes, the information in Column 7 of the inventory at Sansome Street was obtained from this physical inventory, Defendants' Exhibit J, which I have just looked at. Yes, in our report of October 13, 1931, the figures in this column 7 represent the yardage at Sansome street, both in raw material and in bags. Yes, I notice on

the second page of Defendants' Exhibit J, which purports to be the raw material, in the first column, a lot number. Yes, the second column there are certain 'x's', blue check marks. Yes, the next column under the word 'Quantity' there are numbers indicating the number of bales. That inventory totals 271 bales. And a total yardage of 542,000 yards. Answering your question if I will look at our report I will note I have including all raw material and bags, only 465,722 yards, whereas in raw material alone on the very inventory that I said I took this from it shows 542,000 yards, and how do I account for that, I cannot account for that at this moment. As to whether I would say that if there were 542,000 yards of raw material at Sansome street and 136 plus 91 bales of bags besides, that my report correctly shows the amount of yardage at Sansome street, I can't remember the circumstances now, I can't reconcile the two figures, I can offer no explanation. Apparently there is a discrepancy there of some 200,000 yards of burlap. Yes, in arriving at the burlap at Sacramento street, where the fire was, according to the way I figure it in this report of October 13, what I have done is to figure out all the burlap in all locations first. Yes, I note a figure of 1,751,863 yards at the bottom of column 6. Then in order to arrive at what was at Sacramento street I did deduct the amount that I found to be at Sansome street. Yes, if you add 200,000 yards to the figures at Sansome street in order to arrive at the conclusion of what was at Sacramento street on the day of the fire, you would have to deduct that additional 200,000 yards. As to 'that would leave more than 200,000 yards less material at Sacra-

mento street at the day of the fire'—if that were true. I do see the inventory of Sansome street, but this report had to be made according to—you can see the date, October 13, 1931—the court knows what it contains, and we took many short cuts, so I may have also adjusted the bags to some other figure. Answering your question that I cannot say when the raw material alone in the inventory is over 100,000 yards more than I show both in raw material and bags, I cannot give you an answer at this time, not until I can go back into the thing. Answering your question: 'But, Mr. Rickards, using your report, using this figure of 465,000, using your figure, which varies some 200,000 yards or more from the actual inventory taken at Sansome street, your result at the end of your report, this identical report, here, of October 13, 1931, shows on the first page $124,728.20 of burlap on hand with no allowance for the cost of manufacture, and in this schedule that has been added so as to make the exact amount of the material found by you to have been there according to your calculation the exact amount claimed here by plaintiff of $132,947.44; That is the fact, is it not?' That is not the fact. As to what is incorrect about that, this statement, here, that we have on the board, arriving a $132,947.44 was prepared altogether without reference to this statement that you are now cross-examining me on.

Mr. Palmer. I know it was prepared differently, but preparing a statement along these lines with this 200,000 yards error, you still arrived at the same figure.

A. No, we did not arrive at the same figure.

Q. You arrived at a figure of $124,728.20?

A. Which is not $132,947.44.

Q. No, but you explained this morning that the difference between your item and $132,000 was the cost of making the bags which were reflected in your burlap, did you not?

A. And miscellaneous merchandise.

Q. And this brought your figure up to $132,-947.44?

A. There was no attempt made to reconcile the supplementary report with our first report." (Vol. III, pp. 1197-8-9.)

While it is pointed out to him that there is in the report an error of 200,000 yards at Sacramento, he claims that this would in no way affect their apparent figure of $132,947.44. (Vol. III, p. 1200.) He admits that he cannot explain the discrepancy. (Vol. III, p. 1201.) He cannot explain why his report shows only 2414 yards of 40-10 at Sacramento when the inventory taken after the fire shows approximately 96,000 yards of what is supposed to be the same material. (Vol. III, p. 1201.) On cross-examination by Mr. Schmulowitz, he admits that he made a "very stupid error" in this report. Mr. Schmulowitz then asked for leave to withdraw this report and replace it with another. This was denied by the court who stated that plaintiff might file another report. (Vol. III, p. 1215.)

On cross-examination his attention was called to the fact that the total inventory of 37-10 material at both locations on September 30th amounted to 56,000 yards, that there had been no purchases of that material between September 30th and October

19th and yet his report shows that the Hyland Bag Company should have had on hand at the time of the fire 633,968 yards of 37-10 burlap. His only explanation is "I can say as to that, it is evident that the description of burlap on the records of the Hyland Bag Company are in error". (Vol. III, p. 1220.)

He also testifies:

> "Apparently there was not any 37-10 burlap received by Hyland Bag Company subsequent to September 30, 1929, I have gone through these vouchers, they are in chronological order, and I have been informed that there had not been any 37-10 received. I have not seen the paper before you now call to my attention as an inventory of September 30, 1929, at 243 Sacramento street. I notice a lot of descriptive matter missing. I cannot see any 37-10. On the paper which you state is in evidence as an actual physical inventory taken at 1328-1340 Sansome street on September 30, I see here an item, 2199, 37-10, 28 bales, 56,000 yards. I cannot show you any other 37-10 on that inventory." (Vol. III, pp. 1219-20.)

> "I made out the report on October 13, 1931. I am willing to admit that is erroneous." (Vol. III, p. 1221.)

Later Mr. Rickards was recalled and another report of Hood & Strong, still under date of October 13, 1931, was introduced as Plaintiff's Exhibit 101. (Vol. III, pp. 1425-31.) This report shows an apparent value of burlap, cotton and twine amounting to $106,643.29. When it was pointed out to him that this differed from their report of October 1930 by

over $26,000, this witness stated "I have made no attempt in any way to reconcile this figure with the other, *it cannot be reconciled with the other.*" (Vol. III, p. 1435.)

He states that he did not go behind the figure of $132,947.44 to determine whether or not over $46,000 was claimed to have been obliterated. (Vol. III, p. 1437.) He also admits that although he had access to all of the books of the Hyland Bag Company, it is impossible to reconcile the figure of $106,000 contained in their latest report with the report of $132,000 shown in their report of October 19, 1930. (Vol. III, p. 1437.)

He further admits that the only way this figure of $132,000 could be maintained would be to increase an item set up on a schedule designated as Schedule No. 1 and exhibited in the court room showing miscellaneous merchandise amounting to $8219.24 by approximately $18,000. (Vol. III, p. 1441.) No evidence was ever introduced to explain this discrepancy. It must also be remembered that this figure of $106,000 was produced by Hood & Strong after Mr. Rickards was thoroughly examined and cross-examined relative to a duplication of $22,552.50. It gives no effect to that duplication, although he admits:

> "* * * Answering your question: if that is true and there is no invoice representing that 300,000 yards, then there is an error in Ernst & Ernst's report, I cannot testify as to Ernst & Ernst's report. Certainly I accepted their figure of $533,631.50 which includes a figure of $22,-

737.12, for which neither I, nor Mr. Rosslow, nor the other accountants have been able to produce or discover any invoice. In their report of yardage and bales dated October 1, 1931, they show an item of 300,123 yards. I could not say there is an apparent error of *300,000* yards in that report, I did not make the inventory of Messrs. Ernst & Ernst. It was certified to by them and I cannot just say what is in it. *I first saw that item of $22,000 odd in a journal entry produced in court by Mr. Rosslow; what it is I don't know.* It purports to represent 300,000 yards of burlap. Yes, the journal entry is marked Defendants' Exhibit M. *That is the first time I saw that. I did ascertain that that amount had been added to make up the $533,631.50.* Since that time I have examined the work sheets showing that until they added on that 300,000 to take up that amount of $22,737.12, their report of yardage was 300,000 37-10 in excess of the bale lot shown in the work sheets. Answering your question 'So that, as far as you have been able to ascertain, there is nothing to show that that 300,000 yards, or that $22,737.12 is correct?' no, I assume no responsibility for the inventory figures of Ernst & Ernst. I took that for granted. Your question as to whether if there is 'that error of over $22,000 on that error of over 300,000 yards, that has naturally been carried forward' into my work, not as an error on my part, but as an error on previous work, is rather hypothetical. If there is an error in the beginning of the inventory, of course the final result will have that same error. I have not been able to identify that $22,737.12 anywhere in the books. I said yesterday that the invoice for a portion

of stock sheet 2199 was dated June 20, indicating that was the date the goods were received, while the invoice for the rest of it is dated, I believe, some time in July or August, if I remember it was dated in August. The invoice of June 20 is only posted one-third to Lot No. 2199, answering your question doesn't that cover the entire 150 bales? The invoice to which I refer is that of June 20, No. 387, representing 300,000 yards of 37-10 burlap ex steamship 'Silver Elm'." (Italics ours.) (Vol. III, pp. 1215, 1216, 1217.)

COMPARISON OF HOOD & STRONG'S INVENTORIES OF NOVEMBER, 1929 AND OCTOBER, 1930.

It is interesting to note that Hood & Strong's report of November 29, 1929, Exhibit 1 (Vol. I, p. 246), arrives at an apparent inventory of $102,453.23. Their apparent inventory arrived at in their report of October 21, 1930, Plaintiff's Exhibit 2 (Vol. I, p. 249), amounts to $132,947.44. This difference amounts to $30,494.21. The reason for this difference arises from the fact that in the first report there are no duplications of purchases, whereas in the second report, due to the manipulation of the records and stubbornness of these accountants in refusing to admit the same when it was shown to them, there is a duplication amounting to $30,462.12. This duplication is only $32.09 less than the amount of increase in apparent values shown by the second Hood & Strong report.

The entire duplication appears in two purchases from H. M. Newhall. The first amounting to $22,-

737.12, represents 300,000 yards of 37-10 burlap included in the Ernst & Ernst report by Rosslow under lot 2199 on the docks as of May 31st purchased from H. M. Newhall, but not at that time entered on the books of Hyland Bag Company. There is an additional purchase of 100,000 yards of 37-10 purchased from H. M. Newhall amounting to $7725. In view of the fact that these two purchases are set up by Hood & Strong in the report of October 13, 1931, at a cost of .08033¢ per yard, we find that the 300,000 yards represents $24,099 and the 100,000 yards represents $8033, the two together totalling $32,132 out of the apparent value of $106,643.29 set forth in that report. In line with our other calculation of adding $8219.24, which is claimed represents other merchandise, although there is not one word of evidence to substantiate this figure, and obtaining our total of $114,863.53 as the apparent value of the entire merchandise, deducting from that the value of 400,000 yards of burlap as figured in that report, we would find an apparent inventory of $82,730.53.

The original report of Hood & Strong, under date of November 29th, shows an apparent inventory of $102,453.23. This report used as a starting basis the book inventory of December 31, 1928. It appears, however, that a physical inventory was taken as of that date which showed that as a matter of fact the books were overstated in the sum of $20,734.89. This over-statement was corrected by a journal entry, number 4601 (Exhibit 159). (Vol. VI, p. 3191.) Hood & Strong, in making up their reports, did not take journal entries into consideration as they claimed

no adjustments on the books affected their reports. (Vol. III, pp. 1233-4.)

This exhibit, Journal Entry 4601 (Plaintiff's Exhibit 159, Vol. VI, p. 3191), however, as set forth in the transcript, is misleading unless the original is examined. On the original the notation "hold until correct amount is ascertained GPT", is noted in lead pencil, and was made by Taylor. The notation "made before physical inventory was priced", was written by Parker. As a matter of fact, it was made during the course of the trial and before this exhibit was offered. (Vol. VI, p. 3218.) There was no explanation of such an entry at the time of offering Exhibit 159, and it was necessary for us to bring this out on cross-examination of Taylor.

Deducting this over-statement of $20,734.89 from the apparent inventory of $102,453.23, we find an actual apparent inventory at the Sacramento Street plant, as of the date of the fire, of $81,718.34. Thus we find that the original Hood & Strong report, when corrected by the over-statement of the inventory of December 31, 1928, and the second Hood & Strong report, when corrected for the duplication of purchases of 37-10 burlap, differ by only $1011.99. We also find that they corroborate Taylor's perpetual inventory.

AS TO DUPLICATION OF PURCHASES INCLUDED IN HOOD & STRONG'S REPORTS OF OCTOBER 21, 1930, IN THEIR REPORT OF OCTOBER 13, AND IN THEIR AMENDED REPORT OF OCTOBER 13, 1931.

The original Hood & Strong yardage report of October 13, 1931 (Exhibit 30, Vol. I, p. 288), shows an apparent inventory of 37-10 burlap amounting to 633,968 yards. Of this amount, 494,000 yards, which is the equivalent of 247 bales, was supposedly at Sacramento Street. After this report was shown to be unescapably erroneous in one item to the extent of $18,085, it was amended, but the apparent total inventory of 37-10 burlap and the apparent inventory of the same material at Sacramento Street was not changed. (Exhibit 101, Vol. III, p. 1425.) *By these two reports Hood & Strong endeavor to do something which appellant could not do and has not attempted to do by any other witness.*

Taylor, who was the regular bookkeeper and accountant for appellant, the man who kept the records and was most thoroughly familiar with them, states:

> "As to having nothing to show what was actually at 243 Sacramento Street on the day of the fire, *I have never been able to work it out satisfactorily.*" (Italics ours.) (Vol. III, p. 1600.)

Taylor could not give us this information despite the fact that he tells us that his record of receipts of merchandise was 99.9% correct (Vol. III, p. 1461) and that it was a fine record, showing the receipts of materials between May 31 and October 19, 1929. In addition to these fine records, Taylor took inventories

every fifteen days at certain locations and every thirty days at others. (Vol. III, pp. 1368-9.)

Appellant has introduced three of these inventories. One of them represents a physical inventory at Sansome Street as of September 30, 1929, showing only 28 bales of 37-10 burlap on hand. These 28 bales appear under lot 2199, which, as we shall show, is a very important number. (Exhibit 98, Vol. III, p. 1393.)

The next is a physical inventory at Sacramento Street as of September 30, 1929, and shows that at that time *there was no burlap of this grade at the plant.* (Exhibit 98, Vol. III, p. 1397.) We also have the uncontradicted testimony of Rickards that no material of this kind was received subsequent to September 30. He ascertained this from an examination of the vouchers and from information given him. (Vol. III, p. 1219.)

The third document was a physical inventory taken at the Sansome Street warehouse on October 15, 1929. (Exhibit 82, Vol. III, p. 1302.) This inventory shows 26 bales of this material at the warehouse on that date under lot number 2199. The inventory taken at this same warehouse on October 21, after the fire, shows that on that date there were still 25 bales of this material in the warehouse under the same lot number. (Exhibit J, Vol. III, p. 1355.) It is quite patent, therefore, that although Hood & Strong undertake to do that which others could not do, and endeavor to show an apparent inventory of 494,000 yards, or 247 bales of 37-10 burlap, *there could not*

possibly have been at the Sacramento Street plant, on the date of the fire, in excess of three bales, or 6,000 yards, of this material.

This naturally calls for an inquiry to ascertain how Hood & Strong can show an apparent inventory of material which the records of appellant shows that he did not have. Incidentally, this leads us directly to at least $30,000 of the overclaim in the proof of loss which appellant, in endeavoring to support the Hood & Strong reports, would have this court believe was burned out of sight.

Going back to Hood & Strong's starting point for their report of October 19, 1930 (Exhibit 2, Vol. I, p. 229), the Ernst & Ernst report of May 31, we find an addition of $22,737.12 "recording material on hand, but not inventoried, at May 31, 1929, lot No. 2199, H. M. Newhall". (Exhibit M.) This sum is included in the total of $533,631.50, which is used as the starting figure by Hood & Strong. (Vol. III, p. 1215.)

Rosslow, the accountant for Ernst & Ernst who prepared this exhibit at the time he was working in the plant in June of 1929, attempted to give a number of lame explanations of this amount, as to the material it represented, and as to where he saw that material. When it was pointed out that the stock sheet number 2199, from which this material took its lot number, showed that it was at pier 41, Rosslow was recalled on rebuttal and stated that he did not remember ever having been at pier 41. He did not remember where he got lot number 2199, or where he saw the mer-

chandise which was recorded under this lot number under Exhibit M. This was despite the fact that it is shown that 13 bales of 37-10 burlap under lot 2199 were on hand when he was making his inventory and were included in the sheets prepared by Taylor and by him given to and checked by Rosslow. (Defendant's Exhibit K, Vol. II, p. 881.) He could not even tell us what locations were represented by this Exhibit K, although it segregates the material as being on the first floor and on the mezzanine, which corresponds with the plan of the building at Sacramento Street, and that it then continues with an account of 115 bales of bagging at pier 11, 75 pounds of liners at pier 21 and 8 bales of 37-10 burlap under lot 2169 at pier 34. This Exhibit then proceeds to inventory other material which is set forth under the heading "locked", which he believes refers to a locked portion of the warehouse.

We find that Rosslow had prepared a summary of the sheets represented in Exhibit K, which was introduced as Defendants' Exhibit L. (Vol. III, p. 1356.)

In arriving at his inventory, which is incorporated in the Ernst & Ernst report on Exhibit L, he adds the sum of $22,737.12, which is designated as "Adj. #20" "Invty on dock". Adjustment number 20 is the portion of Exhibit M which reads, "recording material on hand, but not inventoried at May 31, 1929, lot No. 2199, H. M. Newhall". Pursuant to our demand, appellant then produced Mr. Rosslow's work sheet covering this item. Defendant's Exhibit EE. (Vol. III, p. 1592.) This work sheet is headed "Lot No. 2199,

on dock at May 31, 1929, Except for 23 bales on Sacramento Street ignored in inventory and cost records". This notation is made despite the fact that Exhibit K, prepared by Taylor, showed 13 bales of this material under this lot number. (Vol. II, p. 881.) This work sheet is then stamped "Hyland Bag Company", then there is some computation: 300,000 at 373 pence per hundred, £4662½ at the rate of exchange $4.85, making $22,613.12½, estimated L. C. (landing charges) charges $124, making a total of $22,737.12. Then in lead pencil there is added "Adj. No. 20". There is then added in lead pencil "No. 237 H. M. Newhall". Incidentally, in this respect it is very interesting to note that the entry of pence was originally 372, but has been changed to 373. Taylor had been questioned at length relative to this matter and could give us no explanation. He was invited to produce any invoices supporting this claim. He testified, among other things:

> "Answering your question: from my examination of the invoices which have been produced in court by the Hyland Bag Company, representing purchases of 37-10 burlap from H. M. Newhall & Co., can I tell you any 37-10, other than that referred to on Sheet 2199, that 150 bales representing 300,000 yards, that could possibly have been on hand prior to May 31, 1929; I could not tell." (Vol. III, p. 1514.)

> "If I can find any invoice for 300,000 yards of burlap of any kind from H. M. Newhall during the year 1929, except this one invoice representing burlap on the dock on May 31, *I will produce it in court.*" (Italics ours.) (Vol. III, pp. 1627-8.)

Neither he, nor any of the others who had spent many days working on the explanation of this item could produce an invoice, check or other record to support their contentions.

Despite the fact that the lot numbers would run in sequence, and that number 2199 would be the next lot number to be set up, Taylor was so evasive that the court finally stated that this number must have been obtained by Rosslow from the records of appellant.

> "That I don't know, where Mr. Rosslow got the lot number 2199. I could not say that was on the bales. I don't know where he got that—yes, we did have a tin on the bales usually, answering your question as to whether we did not generally have the lot numbers on the bales, but this lot, I don't know where he got it from. I don't know where 2199 came from. He had never been there before, no.
>
> The Court. It is obvious, of course, that there was such a lot number.
>
> A. *It would be the next numeral lot number at that time, yes.*
>
> The Court. He must have gotten it from your records.
>
> Mr. Palmer. In other words, then, what you meant by that last answer, Mr. Taylor, was that 2199 was your next lot number that was to be set up?
>
> A. It would run along in sequence, 2197, 2198, 2199.
>
> I meant I think I saw 2198 on one of the stock sheets. That is the reason I said that. *I believe 2198 was the last one that had been en-*

tered up in our books prior to the time that I prepared those typewritten sheets for Mr. Rosslow. *Yes, the next one would be 2199.* Yes, in some way Mr. Rosslow, at the time he took the inventory on May 31 and the next day, got on that day the lot number 2199. As to 'Even though you had not set it up in your books?'. I don't recollect where it come in." (Italics ours.) (Vol. III, pp. 1488-9.)

Taylor also endeavored to show that this data was made up by Rosslow and that the material could not have been purchased from H. M. Newhall & Co. as their invoices were always in American dollars.

"Yes, those are the sheets that Mr. Rosslow gave me. My attention being directed to Defendants' Exhibit K, and on a sheet which has been numbered 7, the notation at the top in red crayon 'Ten bales out 6/1/29'. I now find the same sheet among the sheets given to me by Mr. Rosslow; I do not find on the sheet handed to me by Mr. Rosslow any notation similar or identical with the notation appearing on Sheet 7, there is no such notation here. There is no such notation on any page of the pages handed to me by Mr. Rosslow. I have not at this time any independent recollection concerning that notation, or any circumstances that might have given rise to that notation.

My attention being directed to Defendants' Exhibit M, which was produced by Mr. Rosslow as one of his work sheets, and particularly to the third item on that page, being 'E. E. Adjustment No. 20, recording material on hand but not inventoried at May 31, 1929, Lot No. 2199, H. M.

Newhall, $22,737.12'. I do not recall seeing Mr. Rosslow making either that entry or any entry similar in character. I do not know from what source Mr. Rosslow got the information that appears to be reflected in that particular entry.

Since the trial of this case started, I have assisted several auditors when they were working upon their investigation of the invoices and records of the Hyland Bag Company, on and prior and subsequent to May 31, 1929, for the purpose of determining whether or not that entry of $22,737.12 could be identified; I have been requested to assist them.

Mr. Schmulowitz. And have you placed at the disposal of those who have made these requests of you all information and data in the office of the Hyland Bag Company?

A. Everything that I know about.

Q. So far as you know, have you personally been able to find any invoice carrying that precise amount of $22,737.12?

A. No sir; it is just something out of the clear sky, I don't know anything about it." (Vol. III, pp. 1379-80.)

"I recall the form in which invoices were submitted by H. M. Newhall & Co. for burlap purchased from them. As to whether those invoices were rendered in British pounds or in American dollars, always American dollars. As to from what vendors did the Hyland Bag Company purchase merchandise who rendered invoices only in British pounds and not extended into American dollars, from Calcutta; the Calcutta merchants. That would include the Ludlow." (Vol. III, p. 1381.)

Mr. Rickards obligingly took this cue and despite the fact that Rosslow's work sheets showed the yardage, the lot number, the fact that the material had been purchased from H. M. Newhall & Co., was on the dock at May 31st, and had not been entered in the books of Hyland Bag Company, endeavored to justify the fact that they had included this purchase as being one occurring subsequent to the Ernst & Ernst report *because these work sheets showed a purchase in pence and H. M. Newhall & Co. invoices were in dollars.*

> "The Newhall invoices, to the best of my belief, always extended their figures in dollars, which would lead me to conclude that it was not a Newhall invoice or a Newhall record that was seen." (Vol. III, p. 1242.)

This explanation apparently satisfied appellant and his counsel, but unfortunately appellees insisted upon the production of the Newhall contract (Exhibit Z). (Vol. III, p. 1517.) This contract is on the letterhead of H. M. Newhall & Co., Newhall Building, San Francisco, and is numbered 387. It is dated April 3, 1929, and states that H. M. Newhall Company have that day agreed to sell to Hyland Bag Company 300,000 yards of 37" 10 oz. burlap delivered in good order and condition on board the Motorship "Silver Elm" at Calcutta, India, to be shipped to San Francisco, California, on or about April 7, 1929, at 372 pence per 100 yards, C. & F. San Francisco. (Vol. III, p. 1517.) Attached to this contract is a letter of confirmation under date of April 6th confirming the sale

of the same material at a price of 372 pence per 100 yards, plus insurance, cost of letter of credit, state tolls and duty and one pence per 100 yards commission. Here we find why Rosslow first entered on his work sheets 372 pence and later changed it to 373 pence to include the commission.

There is also attached to this exhibit an invoice from George Henderson & Co., of Calcutta, to H. M. Newhall & Co., showing that there was shipped to them on the "Silver Elm", 150 bales of 37" 10 oz. burlap, bearing the marks "India HMN 51 37"10oz./40" Kamarhatty, S.F. 3875/4024. (Vol. III, p. 1322.)

In view of the fact that this court probably is not familiar with the marking of burlap, we desire to state the evidence clearly shows that all burlap is marked by stenciling on the bales. This clearly appears from all the testimony. The figures at the end of this description, 3875/4024, means that this shipment begins with bale number 3875 and includes 150 bales up to and including bale number 4024. These figures represent the range of the shipment. It is undisputed that such markings cannot be duplicated as Taylor says:

> "Q. It is impossible, is it not, to have two sets of burlap carrying exactly the same marking, the same bale numbers, the same quality?
>
> A. *Yes, it is impossible.*" (Italics ours.) (Vol. III, p. 1516.)

Rickards was either absolutely incompetent as an accountant, or he was thoroughly dishonest and would

go to any lengths to support his report to build up the fraudulent claim of the appellant. On cross-examination he stated:

> "Since Mr. Rosslow was on the stand I have discussed with him the question of trying to locate that item of $22,737.12. He said he was not able to identify it against anything in our report. We were unable to locate an invoice representing the amount $22,737.12. Mr. Taylor's part in the matter was small. Mr. Rosslow believed that that amount had not been entered on the books and that was the reason for the correction. Answering your question: if that is true and there is no invoice representing that 300,000 yards, then there is an error in Ernst & Ernst's report, I cannot testify as to Ernst & Ernst's report. Certainly I accepted *their figure of $533,631.50* which *includes* a figure of $22,737.12, for which neither I, nor Mr. Rosslow, nor the other accountants have been able to produce or discover any invoice." (Italics ours.) (Vol. III, p. 1215.)

He further states:

> "Reference has been made this morning to certain Newhall invoices dated June 20, 1929, and August 6, 1929, and I have indicated that I am unable to identify the item involved in that adjustment of $22,000 odd with the amount appearing upon either one of those invoices. *The circumstances that each of those invoices with the dates just indicated is extended in American dollars indicates that there was not any relationship between the data appearing upon those invoices and the data that must have been or that probably was before Mr. Rosslow in connection with that adjustment.* I examined the work sheets of

Mr. Rosslow in which he had 300,000 yards worked out in British pounds to a Sterling figure. *The Newhall invoices, to the best of my belief, always extended their figures in American dollars, which would lead me to conclude that it was not a Newhall invoice or a Newhall record that was seen.* In other words, if I saw a record that was already extended in American dollars, there would have been no occasion for Mr. Rosslow to have made a computation converting British pounds into American dollars. Upon the face of the June 20, 1929, Newhall invoice the extension already appears, 4650 pounds, extended at $4.85 exchange, $22,552.50. On the invoice dated August 6, 1929, the amount appears in American dollars. Also there was a numeral or identifying figure in association with the adjustment of $22,737.12 which I found; on Mr. Rosslow's working paper, on the sheet wherein he worked out the yardage into American dollars, he had a numeral, No. 237, which would appear to refer to some document. Upon ascertaining that numeral, I attempted to ascertain whether there was any invoice among all of the Newhall invoices rendered to the Hyland Bag Company with that numeral 237 upon it. I could not find any Newhall invoice with a number approximately like that." (Italics ours.) (Vol. III, pp. 1242-3.)

And yet with all of this discussion, neither he nor any of the other accountants went to H. M. Newhall & Co. to see if they could get any information, nor did they go to the steamship lines or to the custom house. If they had been making an honest endeavor to present a proper claim they would have made such

an investigation. It will be noted that Rickards, Rosslow and Taylor all stated that this could not be a Newhall invoice, due to the fact that the work sheets, Exhibit EE, were in pounds and that Newhall's invoices were always in dollars. It will be remembered that they also stated that they could not find any amount which would in any way correspond to $22,737.12.

Let us compare Defendant's Exhibit EE (Vol. III, p. 1592) with the Newhall invoice attached to Plaintiff's Exhibit 87. (Vol. III, p. 1320.) We find that Rosslow started to figure this on a basis of 372 pence and, evidently catching the one pence commission, changed it to 373 pence. He figured his rate of exchange at $4.85. To this he added *estimated* L. C. charges of $124, arriving at this total. It will be remembered that Rosslow's instructions were obtained from a letter dated June 5, 1929, Plaintiff's Exhibit 28. (Vol. I, p. 283.) Newhall's invoice was dated June 20, 1929. This accounts for the fact that Rosslow had to estimate the L. C. charges as to which he came very close for we find a difference of only 50¢ between his estimates and the charges which were actually made in the invoice. The rate of exchange used is identical, namely, $4.85. The results arrived at are identical, as far as they go, with the exception that there is an additional 50¢ on the Newhall invoice. We find that Rosslow figures 300,000 yards at 373 pence per hundred to amount to $22,613.12½. Newhall takes the advantage of the extra ½¢ and we find that by adding their charge for 300,000 yards at

372 pence, amounting to $22,552.50 to the fourth item, representing commission, amounting to $60.63, they then add $124.50 for marine insurance as against $124 L. C. charges by Rosslow, making a difference of exactly 50½¢ in the final calculations. The only reason that there is any difference of any kind between these calculations is that Rosslow apparently did not know that of the items of tolls, amounting to $15.32, and of duty, amounting to $1734.38, which are incorporated in the Newhall invoice of June 20th, bringing the total to $24,487.33. (Vol. III, p. 1320.)

Before proceeding with the further discussion of appellant's records, let us call to the court's attention the fact that these are all either on cards or on loose leaves. There could be substitutions at any time. Fortunately for us, however, in the majority of instances we find that the changes were made on the face of the records. We do know, however, that most of the entries were made after the fire, as Taylor has so testified.

> "Yes, I testified that for the last month or two before the fire I hardly touched the books. Yes, by 'books' I include the stock sheets, too. And the ledger, everything pertaining to the books." (Vol. III, pp. 1486-7.)

> "As to this bearing date May 31, but I entered it in October, there have been no entries in the book, at all, between May 31 and October, at the time that I started to work everything was in a chaotic state." (Vol. III, pp. 1524-5.)

We turn now to the stock sheet referred to in Rosslow's working papers, number 2199. (Exhibit

83.) (Vol. III, p. 1306.) We wish that the court would examine the original of this stock sheet, for it has been so altered and added to that the exhibit as set forth in the transcript does not give its full significance. We note that the typewritten date originally placed on this sheet was May, 1929. This date has been changed in lead pencil, admittedly by Taylor, to June 20th. (Vol. III, p. 1464.)

He also entered at the top of the sheet "Rec'd 6/2/29".

> "As to showing you on Plaintiff's Exhibit No. 83 where the information is on that sheet from which I can fix the dates that the goods referred to were received on Sansome or Sacramento street, the steamer 'Silver Elm' is here and May 20 has been scratched out and June 20 written over it, and up here August 6, 1929. I don't know when these goods arrived in the place. That stock sheet appears to contain information from which I could fix the arrival of the goods, yes. I don't know, I couldn't trace that. May 29 originally was written in and scratched out and June 20 in my hand, I saw it at some time and wrote June 20, yes, 1929, and up here, 'Rec'd 6/2/29'. I don't know what that means, but I think the 'Silver Elm' arrived in the harbor about that time. I think about June 1, of 1929, somewhere around there. I am not sure. As to whether the steamer arrived prior to that time, I had no occasion to remember it, recollect it." (Vol. III, pp. 1463-4.)

Even despite these statements of Taylor, we find no attempt to dispute the date of the arrival of the "Silver Elm" which brought these goods to this port.

On stock sheet number 2199 we find identically the same description as in the Henderson invoice represented by the sale of April 3, 1929. (Exhibit Z, Vol. III, p. 1322.) This description is "150 bales 37/10 burlap, 300,000 yards, marked India HMN 51, 3875/4024, Kamarhatty, Ex Steamer 'Silver Elm', Ex Pier 41". The fact that these goods were received on June 2nd, as stated by Taylor, is further evidenced by *this sheet* which *shows that they were used beginning June 3rd.* When stock sheet 559 (Plaintiff's Exhibit 84, Vol. III, p. 1309), was introduced in evidence, the first sheet was missing. Taylor either found that missing page, or reproduced it, and it was introduced as Plaintiff's Exhibit 158. (Vol. VI, p. 3186.) This sheet shows that 22 bales of this material had been made into bags on June 4th.

Incidentally, it will be noted that two other entries on the front side of the sheet are erased, and that there have been changes under the title "used". This is very important as there have been additions to this card and a deliberate attempt to confuse this burlap with other material that was received under stock sheets numbered 2187 and 2200. In the same way there has been entered on the carbon copy of the voucher in payment of this invoice, figures in red ink indicating that the invoice and voucher covered not only stock sheet 2199, but also stock sheets 2187 and 2182. We do not know when these red ink entries were made, but the brazenness of appellant and his employees can be more readily appreciated when we realize that this voucher is dated July 27, 1929, and these figures purport to segregate this material to

other lot numbers, which, according to the testimony of appellant's witnesses, were not purchased until after the date of the voucher. We proved by the testimony of Almer Newhall, and by the delivery order of H. M. Newhall & Co. (Defendant's Exhibit PP, Vol. IV, p. 2091), that the "Silver Elm" arrived at Pier 41 in San Francisco on May 25, 1929, carrying this 150 bales of 37-10 burlap, and that on May 31st the General Steamship Corporation was directed to deliver the same to Hyland Bag Company. We then turn to stock sheet 2187. (Exhibit U, Vol. III, p. 1238.) An examination of this stock sheet shows that not only are appellant's contentions relative to it untrue, but that this stock sheet has also been changed. It was originally dated April, but this was erased and the date of June substituted. This stock sheet called for 50 bales of the same type of material, namely, 37-10 burlap, but we find that the markings are entirely different. This burlap is marked "India L83 MA HMN 1/25", and "India L83 IA HMN 1/25". There is also a change, in that there has been other writing scratched out, namely, "their burlap warehoused for them". We shall deal with this later.

Appellant was careful not to fill in any contract number, steamer or pier on this stock sheet. Twenty-five bales of this burlap, being those marked "L83 HMN MA 1/25", arrived on the SS. "President Jefferson", on April 17, 1929, as is shown by Newhall's invoice attached to Plaintiff's Exhibit 88 (Vol. III, p.1324), while this invoice is dated August 6th and purports to complete a sale of August 2nd.

The records of the Dollar Steamship Company, as shown by a letter which was introduced in evidence under stipulation, shows that 50 bales were delivered to Hyland Bag Company, under orders from H. M. Newhall & Co. on April 25 and 26, 1929. (Vol. IV, p. 2095.) We shall show later that as a matter of fact the invoice of August 6th, covering this material, and the fact that this stock sheet shows that it was merchandise of Newhall warehoused for their account, was the result of appellant's dealings with Colbert, an employee of Newhall. We have already pointed out that these stock sheets are numbered chronologically, which would have put stock sheet 2199 in May, the date it originally bore. It is interesting to note that the goods represented by stock sheets 2184, 2185, 2186, arrived on the same steamer with the goods represented by 2187. Naturally, appellant could not permit the date of May to remain on stock sheet 2199, and the date of April on the stock sheet 2187 and still claim that these goods were not in San Francisco when Rosslow was doing his work, when they were included as later purchases by Hood & Strong.

According to stock sheet 2187 the material was made into bags on June 20th. Plaintiff's Exhibit 158, showing production of bags, shows, however, that the entire 50 bales represented by stock sheet 2187 had actually been made into bags on June 10th.

As a matter of fact, these goods represented by stock sheet 2187 were actually sold by H. M. Newhall & Co. to appellant under Newhall contract 9486,

under date of December 1, 1928. That contract was filled by deliveries from the "President Jefferson" of 50 bales, and "President Jackson" of 50 bales, under Newhall delivery orders 310 and 426. They were originally sold at 8.17¢ per yard.

The merchandise represented by stock sheet 2200, (Plaintiff's Exhibit 96) (Vol. III, p. 1384) consisted of 50 bales of 37-10 burlap, 100,000 yards marked "L-83 HMN SF 5/100," and arrived on the S. S. "President Jackson." This vessel arrived in San Francisco on May 29th and the entire 50 bales were delivered to appellant on June 4th, 5th and 6th. (Vol. IV, p. 2094.)

According to Plaintiff's Exhibit 158, the entire 50 bales was made into bags on June 8th. They were delivered to Hyland under Newhall's delivery order 426. (Vol. IV, p. 2091.) After the arrival of the 200,000 yards of material represented by these stock sheets, and after they had been actually converted into bags by appellant, Colbert, an employee of Newhall, to whom we shall later refer, cancelled this contract under date of June 20, 1929. Under date of August 6th a new invoice was made by Colbert, reducing the price from 8.17¢ per yard to 7.72½¢ per yard, and apparently setting up as a sale on August 2, 1929, goods which had actually been sold in December of 1928 at a higher price, and which had actually been converted into bags by appellant two months before the purported sale. This invoice also purports to be covered by Haslett Field Rec. F10259. Newhall could find in their records no copy of any

such receipt. It appears that as a matter of fact there were 100 bales of some kind of burlap in the Haslett Warehouse under such a receipt, but they were withdrawn on July 24th, 26th and August 2nd. (We have summarized this transaction which is set forth at length in the testimony of Almer M. Newhall in Vol. IV, pp. 2096-2102.)

We then produced Newhall's records showing that there were no purchases of 37-10 burlap in 1929, except the 300,000 yards shown by the invoice of June 20th, 350,000 yards shown by invoice of July 27th and 200,000 yards shown by the invoice of August 6th. Also there were no purchases of burlap of any kind from Newhall between January 1st and June 1st. The transcript of these records was introduced in evidence as Defendants' Exhibit NN. (Vol. IV, p. 2081.) The item of 350,000 yards, consisting of 175 bales, arrived on July 20, 1929, and is properly included in purchases after the date of Ernst & Ernst's inventory. (Vol. IV, pp. 2086-7.)

Rosslow stated he never gave his figures to Hood & Strong. He was forced to admit that anyone following Hood & Strong's method, without his data, would make an error of $22,737.12. (Vol. II, p. 917.)

> "With reference to Defendants' Exhibit EE, I cannot tell you where I got those figures of 300,000 yards and 373 pence. I cannot recall whether I saw Defendants' Exhibit Z or not, I know that I looked at some of these contracts. I could not say whether I saw this one having 372 pence per hunderd yards and 1 pence per hundred yards commission, or not. I cannot recall

where I got that information 'that these goods on the dock which had not been inventoried were lot 2199.' I am quite sure it was furnished by Mr. Taylor, either verbally or he handed me something that he had made up. I can't recall whether I saw stock sheet 2199 then, or not. *I must have had some evidence on which to base my figures of $22,737.12 adjustment. I cannot tell you where they came from.* As to where I got the information that this burlap was from H. M. Newhall, it would have been from the same source, but I could not tell whether it was written or the nature of the document. In the course of my audit I certainly would see invoices dated after the 1st of June. My audit continued for some time. As to Exhibit No. 88, an invoice dated June 20th, from H. M. Newhall, I could not say if I had seen that invoice before. Yes, you call my attention to the extension of pounds into dollars, amounting to $22,552 and some cents. There is also an item of commissions $60.63. Those two items do indicate the same amount in dollars that I arrived at by multiplying by 373 pence per hundred yards. Then I estimated $1.24 for letter of credit service, yes. That is the way I arrived at $32,737.12, yes. Or 12½ or 13 cents if the other way, yes.

Examining that contract and the invoice and my work sheet with the view of refreshing my memory as to whether that is the burlap that I found on the wharf at that time, I have nothing in mind other than what appears in my work sheet, and there is nothing there that I can definitely say that could be tied in with this invoice. I made no investigation since, to endeavor to ascertain whether that is the burlap that is rep-

resented by the invoice of June 20, although I have looked over my papers to see if there could be anything besides this one sheet of paper that might lead to something. I don't know what that figure 237 was. It is evidently a number, it is preceded by a number sign. No, I have no idea of what that could refer to. Yes, I did actually find that burlap on the docks at that time, with the exception of some bales that I found at 243 Sacramento street. I do not remember what dock that was. I can't remember now whether it was Pier 41. I have nothing in my work sheets to show that. I can't recall having found or having seen the invoice, itself, representing these particular goods for which I made the adjustment of $22,737.12. I can't recall whether I have seen this invoice of June 20 covering 37-10 burlap, H. M. Newhall, before, or not, I have seen many similar ones. I cannot possibly remember after two years whether I have seen any invoice of H. M. Newhall covering 37-10 burlap. No, I have no recollection of it. No, I have not been making some investigation during the last month, none other than, as I said, looking through my papers to see if I could get anything besides this. No, I have not been at the Hyland Bag Company working on papers, I went up there to talk to Mr. Parker once. Yes, concerning this particular item, it was in that connection that I looked through the papers, we wanted to see if there could not be something besides that 237, or any reference to this 237, or any other thing that could lead to it. *Yes, if that is the only burlap from H. M. Newhall & Co. sold or delivered to the Hyland Bag Company*

between January 1, 1929, and June 20, 1929, I would think that is the burlap that is represented by that invoice and that contract." (Italics ours.) (Vol. IV, pp. 1715-16-17.)

"If a person had not seen my work sheet and all they were furnished was $533,631.50, an extract of my report showing that inventory, there would not be anything to call their attention to that $22,737.12, not unless they went further and reconciled the figures of $533,631.50. You would have to go back and reconcile it, as I said, the book figures to the $533,631.50, and then carry on. Subsequent to May 31, and prior to the time that I came out to Court to testify, no one asked me for the work papers, personally. I am positive that those work papers were never furnished to Hood & Strong." (Vol. IV, p. 1720.)

In this respect it is interesting to note that Rosslow was instructed to produce the records of Ernst & Ernst showing the dates on which he did his work at Hyland Bag Company. It appears that his inventory pricing and checking was done on the 17th, 18th and 19th of June, after lots 2199 and 2187 were received by Hyland, and before the invoices were received from Newhall. (Vol. IV, p. 1722.)

Despite the testimony that we have shown, and despite Mr. Schmulowitz' doubt as to this item, appellant endeavored, on rebuttal, to prove that, as a matter of fact, the inventory of December 31, 1928, was not less than the book inventory of that date. As we have shown, appellant's journal entry number 4601 (Vol. VI, p. 3191), recognized that fact

and made that deduction. On rebuttal the inventory of December 31, 1928, was introduced. (Exhibit 160, Vol. VI, p. 3194.) We wish that the court would examine the original of this exhibit in following our statements relative to it, the additions made to this inventory and the ease with which such changes could be made.

The first page of this inventory shows bales of burlap, giving the lot number, number of bales and description of the material. The total of $115,145.64 appears in red ink. At the foot of the page, and below the red ink totals, we find added Lot No. X01, 34 bales 37-10 buralp $5425.29; lot No. X02, 104 bales 37-10 burlap $17,467.83. These two items total $22,-893.12. In this connection the court should note that it is necessary not only to wipe out this discrepancy between the book inventory and the physical inventory as of December 31, 1928, but that it is also necessary to build up the apparent inventory of one particular grade of burlap, namely, 37-10. This was necessary not only to show that there was no duplication by Hood & Strong, but to attempt to substantiate their so-called yardage and poundage inventory of October 13, 1931. (Exhibit 30, Vol. I, p. 288 and Exhibit 101, Vol. III, p. 1425.)

We have already shown that the material added at the bottom of the page of the inventory, namely, lots X01 and X02, represented 138 bales of this material. Attached to this inventory we find a recapitulation sheet. The center column of this sheet starts with a credit of $116,105.25. This total is the red

ink original total of the first page of the inventory, giving effect to an adjustment of $959.61—as shown on that page. The total as it now appears on that first page—obtained by subsequently adding X01 and X02, does not appear on the recapitulation sheet. On this sheet we find a total, in fact two totals, as it will be noted that there are several figures scratched out and changes made. One of these, representing the deduction of $20,734.89 set up in Journal Entry 4601 (Plaintiff's Exhibit 159) is, as a matter of fact, definitely tied in to the journal entry by the notation "J. E." where the amount is deducted from $31,-546.26 which was originally set up opposite item 25-13, and changed as the result of the deduction of this journal entry to $10,811.37. The total shown on that page was originally $178,473.35, from which was deducted the amount of the journal entry, leaving a total apparent inventory of $157,738.46. These totals do not include X01 or X02 put down below, and we do not know when this was done, nor do we know when X01 or X02 were added to page 1 after it had been totalled. We also find another addition, including this sum of $22,893.12. We also find an addition showing how this sum was obtained. It will be noted that the figures $5425.29 and $17,467.83 correspond with the additions to the first page of the inventory representing X01 and X02, respectively.

We then find, under date of February 28, 1929, that Journal Entry No. 4715 was made crediting R. C. Hyland Investment Account with $11,056.16. (Defendants' Exhibit FFF, Vol. V, p. 2383.) Under

date of March 31, 1929, Mr. Taylor then set up Journal Entry No. 4752 (Defendants' Exhibit GGG, Vol. V, p. 2583), crediting R. C. Hyland Inv. Acct. $3498.36. There is attached to this "Explanatory, stores used in manufacturing during March 1929". Taylor admits that Journal Entry No. 4715, amounting to $11,056.16, represented 67 bales on stock sheet X02 and that Journal Entry No. 4752, amounting to $3498.36, represented 21 bales on the same stock sheet, making a total of 88 bales, or $14,554.52. He also admits that he had already adjusted his inventory as of December 31, 1928. He does not remember when these entries were actually made, but admits

> "They might have been a little bit later than the month they bear date." (Vol. IV, p. 1810.)

We then get a further very interesting admission from him.

> "I don't know without going into it, I could not answer that. As to whether I had to increase my books over $20,000 to make my books correspond with my physical inventory, that is something I could not state off-hand, what the entry was, or what I did, that is going back a long time. I don't know now whether in February and March I increased my inventory, apparent inventory, by $14,554.52, that is going back a long time, I don't know now how I adjusted, what the detail of the 1928 adjustment was. I don't remember the detail, the books will show that.
>
> Yes, referring to Stock Sheet X02, that stock sheet is the year 1928. Yes, and represents bur-

lap made into bags in 1928, it should have been, yes. 521 is my number for bags in 1928. Correct, bags made in 1929 bear the number 559." (Vol. IV, pp. 1811-12.)

Referring to stock sheet X02 (Defendants' Exhibit KK, Vol. IV, p. 1812), we find that as a matter of fact that was a stock sheet for the year 1928. According to Taylor's admission the manufacturing number 521 refers to bags manufactured in that year, whereas bags made in 1929 bore the manufacturing number 559, a stock sheet which has already been referred to.

Stock sheet X02 shows on its face "year 1928". It also shows that the bales of burlap represented on that sheet were a monthly balance from 1927 carried over and used in February; that they were not, as a matter of fact, a balance carried over from 1928 to 1929. We find that the first seven items are totalled, showing 67 bales of a value of $11,056.16, corresponding with the credit set up to Richard Hyland Investment Account by journal entry 4715. (Exhibit FFF, Vol. V, p. 2383.)

On the left we notice the notation that it was used in February in making bags under the manufacturing number which Taylor states represents burlap made into bags in 1928, namely, number 521. Following this we find other burlap used under the same manufacturing number with a notation on the left "21 used Feby.", and on the right, opposite the third and fourth items, we find the notation "J. E. Feb. 1929". As we have already pointed out, Taylor admits that

this makes up the total of $3498.36 credited to Hyland's account by journal entry 4752. (Defendants' Exhibit GGG, Vol. V, p. 2383.)

Below, under the heading "used", we find that the 67 bales having a value of $11,056.16, were made into bags on January 31; and that the 21 bales, having a value of $3498.36, were made into bags on February 28. The sheet is marked "completed". (Vol. IV, p. 1813.)

As a matter of fact, the error in Hood & Strong's report is greater in regard to the 300,000 yards, as they figure it at .08033¢ per yard, amounting to $24,-099. In addition to that there is the other duplication which we have pointed out, of the 100,000 yards amounting to $8033, making a total error of $32,132. On the other hand, Rickards tells us that Rosslow undoubtedly made an error in making this adjustment. He states that a cancelled check would have been the best evidence of a purchase, that the record of the checks was complete, but that there was no check to H. M. Newhall. That, therefore, Rosslow must have made an error and there was no justification for this amount of $22,737.12. No wonder that Mr. Schmulowitz, who was at that time the attorney for appellant, stated:

> "Mr. Palmer indicates that the figures presented by the accountants produced by the plaintiff, except for the one issuable item arising out of the Rosslow report, or the Ernst & Ernst report, of $22,000, in connection with which I may frankly state to your Honor I am in doubt personally at the present time." (This quotation is

from Vol. 13, p. 1154 of the reporter's typewritten transcript and was omitted from the printed transcript.)

At another time Mr. Schmulowitz states:

> "I want to say in that respect, your Honor, that we have sought to place before the Court everything that we can possibly find that is pertinent to that particular item. Upon that basis I think Mr. Rickards has testified that he is satisfied personally that the additions of purchases are not a duplication of that item, but that he cannot determine from the Rosslow data exactly what Mr. Rosslow had in mind when he included that item as part of that $533,631.50. *That is the reason I say that until it is possible to tie it in, or until it is possible to demonstrate that there is a duplication, there is doubt as to that item.*" (Italics ours.) (Vol. III, p. 1581.)

Appellant had produced as Exhibit 84, stock sheet 559, which, as we have previously shown, represented goods manufactured in 1929. Mr. Taylor either found the original sheet, or as he says, reproduced it. This was introduced on rebuttal as Plaintiff's Exhibit 158. (Vol. VI, p. 3180.) In order to bolster up the claim and prove that there was actually 37-10 burlap on hand, two items had been entered at the bottom of the second page. These were out of order chronologically, and were apparently an afterthought. One of them was in lead pencil, supposedly representing 37-10 burlap, set up under lot X02, of a value of $8338.68. This was never set up on the books and was, as a matter of fact, added to these sheets after the fire, and after

the filing of the proofs of loss. The cross-examination of Mr. Taylor in this respect is very interesting.

"Plaintiff's Exhibit No. 158 is the preceding part of the sheet which Messrs. Cerf & Cooper did not have available in this written-up form when they examined the books. I have produced only the first sheet because I presume they made a copy of the other sheet; they had it in front of them and used it in the office for several days. X02 appears on that. It does on the other sheet, also; it does in the amount, I think, of $8000—$8338.60. In regard to that, yes, *I was examined at the time I was previously on the stand; as to 559. As to why I did not produce the entire sheet at that time in connection with Plaintiff's Exhibit 84, which also represented the 559, that is correct.* Since that time I have made up this sheet, I made it up in an hour, went right over the records and made it up; they did not make it up, so I made it up for them.

Mr. Thornton. Q. In regard to the second sheet of this, after August, you go back to somewhere in June and set forth in lead pencil X02——

A. I have it right here.

Q. Let us see it.

A. Yes. Let me give you the key to this.

Q. I think I have the key to it.

A. You have?

Q. I think so. In other words, the second sheet which you are now producing runs along with entries, the last entries being August 1, 6 and August 1; is that correct?

A. Yes.

Q. Then later 2199 is added under date of July 23: Is that correct?

A. Yes.

Q. And in lead pencil X02 is added under date of June 20—all of these appear in lead pencil, but give no date except June blank?

A. June blank.

Yes, that was added by me sometime after the completion of the stock sheet as it stood. I did not discover that until some time after the fire—along about that time, I think somewhere around in there. That has been there for a long time. It would have to be, because I would have no way of getting the number of bags made unless the material was all on that sheet. *This figure of 2199 and July 23 and X02 under June were added after the proofs of loss were filed, yes, surely. Yes, somewhere in 1930.*" (Italics ours.) (Vol. VI, pp. 3213-14.)

AS TO APPELLANT'S EVIDENCE AS TO THE AMOUNT OF LOSS OR DAMAGE.

This evidence is well summed up on page 31 of appellant's brief.

> "Plaintiff testified that he noticed what he would judge a lot of ashes after the fire. (V. 1, p. 471.) It appears from the testimony of disinterested witnesses that a great deal of debris was removed following the fire. (V. VI, pp. 3050 to 3060; V. II, pp. 767-8.) There was some out of sight loss as the court finds." (V. I, p. 185.)

This is disputed by every witness produced by appellees who had been on the premises after the fire. We shall not unduly enlarge this brief by quoting the testimony of the adjusters, of the men of the Under-

writers' Patrol, who were there to protect the property, or the firemen. We shall refer to Mr. Radford, and his inventory, later.

The only other method of attempting to prove damage is by deducting from the figures of Hood & Strong's apparent inventories the amount of the Radford inventory.

We have already shown that the Hood & Strong apparent inventories are erroneous, and that they do not prove or tend to prove that there was any merchandise damaged or burned out of sight. In addition we shall show that the inventory taken after the fire absolutely corroborates this statement.

While the burden was on the appellant to prove his loss, the attitude throughout the trial was that the burden was upon the insurance companies to disprove it. There is not one word of evidence in the entire record to indicate what, if any, merchandise was damaged.

Appellant employed one Ben Sugarman as his adjuster. Sugarman, of course, was vitally interested in building up a large loss as his compensation was based on a percentage of the recovery. (Vol. II, p. 1008.) Yet Sugarman could give us no information to substantiate the fact that any merchandise was destroyed, obliterated or burned out of sight.

> "I did not tell the adjuster or Mr. R. V. Smith that the out-of-sight was my ace-in-the-hole. *As to R. V. Smith telling me in his opinion nothing was burned out of sight, I do not think I put it down to any definite amount; I told him*

there must be an out of sight there. I do not know what was burned out of sight. I endeavored to ascertain by the Hood & Strong statement. Yes, in answer to your question 'you took the Hood & Strong statement setting a value of $102,-000, you took the value set forth in the schedule attached to the proof of loss, and arrived at the opinion that the difference between them represented something that must have been burned out of sight'. Not having been in the premises at any time before the fire I could not tell you what was missing there. *I did not endeavor to ascertain what was burned out of sight.*" (Italics ours.) (Vol. II, pp. 1024-25.)

Taylor could not give us this information.

"* * * As to having nothing *to show what was actually at 243 Sacramento street on the day of the fire, I have never been able to work it out satisfactorily.* As to can I tell you at the present time the description of any bags that were destroyed in the fire, there must have been bean bags destroyed. There should have been bean bags in the plant at 243 Sacramento street on the day of the fire. I do not know whether or not there were any. I don't recollect. I did not see them physically, but, according to all the records, they should be there. No, I don't know where they should have been in the plant. I don't know whether they were finished or were in process, but I would say they were in process, but I don't know what state they were in. I don't know what floor they would have been on." (Italics ours.) (Vol. III, p. 1600.)

He further states:

> *"I cannot determine from the stock sheets what was in that plant in either burlap or bags on the day of the fire."* (Italics ours.) (Vol. III, p. 1601.)

He further states :

> "No, *I cannot 'explain that $46,000 burned out of sight',* not now. If I went into it full I probably could." (Italics ours.) (Vol. III, p. 1604.)

We now come to the question of debris. Mr. Ledgett, Mr. Hudson, and other witnesses, testified that this was removed under the direction of Radford. Both Radford and Smith testify that no merchandise, with the exception of one load, was removed, except under Radford's direction, to the warehouse on Green Street, and that this one load was removed by Sugarman and returned to Green Street. They also state that there was no debris of merchandise, that all of the merchandise not only could be, but was, identified and moved to Green Street. Appellant produced a scavenger, one Baldocchi, who testified that there were seven loads taken out of this plant. He testifies:

> "* * * I do not keep a notation of what I put on these trucks, no, I keep track of the loads. No, I do not keep any record of what goes in them. Or of the weight, or the quantity, no." (Vol. VI, p. 3052.)

> "The Court. Q. When you say you hauled seven loads was it from any particular part of the building?

A. No, it all taken out from that ground floor on the back and the sidewalk, I never went upstairs.

Q. You made a contract to do what: to clean the building, or clean a certain part of it?

A. I gave a price of $70, and after the job was done we figured up and found we lost money.

Q. I want to find out whether you cleaned the whole building, or part of it.

A. We cleaned all the stuff that was on the sidewalk, and inside of the building on the ground floor.

Q. You did not clean any of the upper floors?

A. No, we didn't do anything with the upper floors?

Q. You cleaned the ground floor?

A. Yes.

Q. The basement?

A. Not the basement.

Q. Just the ground floor?

A. There must have been a lot that they brought down, they were bringing a lot of stuff down." (Vol. VI, p. 3053.)

"A. I don't know whether it was brought down, I didn't see them bring it down. There was a big pile off the main floor in the back, and there was a whole lot of canned stuff on the sidewalk." (Vol. VI, p. 3054.)

"A. I will tell you, all I know is to make seven loads there must have been a lot of stuff there." (Vol. VI, p. 3059.)

Prior to this man's taking the stand, the appellant had called one of his employees, a man named Hudson.

"Now, about removing this debris, as to whether we could clean up a floor and then remove the debris afterwards, Mr. Ledgett would tell us that Mr. Radford said we could move this or move that, and we would go up and clean it out. Oh, no, that was not after we removed all the merchandise, it was before. Yes, sir, that was before. I don't know how many days it was after the fire when we started moving this debris.

Mr. Thornton. Did you remove the ten loads in the Kleiber truck and the seven or eight that the garbage man took away before you started moving this merchandise to Green street?

A. We hauled the stuff out to the dumps before that, yes; and the garbage man, I believe was before that, too; I would not say for sure.

Q. Was Mr. Radford there when you were hauling that away?

A. Yes, sir.

Q. *But that was all before you started moving anything to Green Street?*

A. *Yes, sir.*

Q. And that was all gathered up under the direction of Mr. Radford?

A. Yes, sir.

Q. And he would tell Mr. Ledgett to tell you to take it away?

A. Yes, sir.

Q. This stuff that was taken away by the scavengers, do you remember when that was taken?

A. No, sir." (Italics ours.) (Vol. II, pp. 742-3.)

"Q. *A large part of it was sawdust and shavings, was it not?*

A. *Not all of it.*

Q. *A large part of it was?*

A. *Yes, sir.*

Q. *The bulk of it was?*

A. *I believe so.*

Q. Did Mr. Sugarman tell you to haul some stuff away before Radford gave you any instructions?

A. No, sir.

Q. Did Mr. Ledgett tell you to haul away some burlap that was on the floor, there?

A. *There was nothing moved until Mr. Radford told us to.*

Q. *There was nothing moved until Mr. Radford told you to?*

A. *No, sir.*

Q. *You are positive of that?*

A. *Yes, sir.*" (Italics ours.) (Vol. II, p. 744.)

There was consistent contention throughout the trial that despite this testimony there was over 100 tons of debris removed. To show plainly the fallacy and fraud in this connection, let us figure what 100 tons of debris would mean. One hundred short tons would amount to 200,000 pounds. According to the testimony, 40" 8 oz. material weighs 8 ounces, or ½ pound to the yard. We shall take this as an illustration, although this material is much heavier than cotton, and much heavier than the average material shown in the inventory. The inventory shows only 117,797 yards of 40-8. There are only 29,767 yards of material heavier than 40-8 and 260,286 lighter than 40-8. The claim is so ridiculous that we are willing to take a figure much heavier than the average. Using

40-8 as our illustration, it would mean that 200,000 pounds would represent 400,000 yards of this material. On the cross-examination of Ben Sugarman there was introduced Defendants' Exhibit P. (Vol. II, p. 1007.) While this is not set forth in full in the transcript, it is sufficiently summarized. The percentages of damage set forth in this exhibit were used in figuring the damage to the various items in the schedule attached to the proofs of loss. The numbers of the items in Exhibit P correspond to the number of the items in the schedule attached to the proof of loss. In this schedule are shown many thousands of yards of material claimed to have been damaged 90%, yet this material is not classed as debris. As a matter of fact, it was salvaged and it was possible to identify the quality of the material and number of yards. It is therefore fair to assume that any material which would be classed as debris must have been damaged in excess of 90%. We shall, however, use the 90% as a working basis as we again desire to make our contention as obvious as possible, giving the appellant the benefit of every doubt. If this so-called debris was 90% destroyed there would be only 10% remaining. 400,000 yards therefore must have represented only 10% of the original material. On this basis 100 tons of debris would have represented 4,000,000 yards, or 2000 bales, using 40-8 as our standard. Using appellant's values for 40-8, as set forth in his schedule, we would find that the value of this 4,000,000 yards would be $320,000, and yet the highest claim we have for value at this plant was $132,000, of which in excess of $86,000 is accounted for.

In order to show further the type of testimony upon which appellant relies, let us illustrate what 2000 bales would mean. We made a demonstration relative to Mr. Hyland's contention concerning the stock on the second floor. In demonstrating his contention we had an extra model of this floor eliminating all machinery and anything else that would necessitate a deduction from the amount of floor space. We placed 150 bales on this second floor. These 150 bales more than covered the entire area, including that which we know was occupied by machines. We shall, however, again give the appellant the benefit of any doubt in this argument, and take 150 bales as an illustration. There were four floors to this building. Taking 150 bales to the floor, if placed singly and covering every inch of space, we would find that the fourth floor would accommodate 600 bales. In order to put in 2000 bales we would have had to cover each of these floors completely three and a third times. In other words, to put into this building merchandise representing 1000 tons of debris it would have been necessary to cover the four floors solidly to the depth of seven and a half feet (using the size of the bales as shown on our model list (Exhibit KKK, Vol. V, p. 2438), which is undisputed) leaving no space for the machinery or for the merchandise that was inventoried after the fire.

Perhaps an even better illustration would be in line with our Exhibit JJJ. This was the exhibit representing the second floor in accordance with Mr. Hyland's testimony as to its contents. While we do not

know whether or not the models representing merchandise are still in position in this model of the second floor, we have in evidence photographs showing the result of attempting to place this merchandise on that floor. An examination of these photographs will show the court that it not only blocked all doors and windows, covered all space occupied by machinery, but it projected above the height of the walls. 2000 bales of burlap would have filled two floors to the same extent after removing all machinery and the stock which was later found in the building and inventoried. These illustrations will probably give the court a better idea of the meaning of this claim relative to debris.

We would also like to know why, if there was any debris representing merchandise, Mr. Hyland's expert, Mr. Sugarman, was not informed of it, and why we have no testimony from him relative to debris and as to merchandise represented by it. We would also like to know why no attempt has been made to show either the trial court or this court what that merchandise was. We would also like to know why it was not called to the attention of insurance adjusters who were there to determine Mr. Hyland's loss.

Fire Chief O'Neil testified that burlap is not inflammable, and that he had had experience with it in a number of fires. He testified relative to the fire at the Pacific Bag Company where the entire building had collapsed and yet they could identify the burlap, although streams of water had been played on this for days.

Mr. Logie, who had years of experience in the burlap business, and also had experience with fires in burlap, stated that it was not subject to spontaneous combustion, not readily inflammable and that a building such as the Hyland plant would burn before the burlap.

Mr. Parker of Bemis Bag Company, their Traffic Manager, told us that he had had a great deal of experience in adjusting claims and that it was almost impossible to burn burlap. Other witnesses testified to the same effect.

In addition to that, R. V. Smith performed an experiment in court with one of the models representing an open bale, which consisted of loose pieces of burlap fastened together in the center. (Vol. V, p. 2680.) This was not introduced in evidence as the damage was so slight as to be almost invisible. This testimony and this evidence evidently impressed the court and we quote again from the opinion:

> "Plaintiff contends that burlap burns rapidly and even advanced the theory that it was subject to spontaneous combustion. Disinterested witnesses, including the fire department officials and men in the burlap business who were familiar with fires in burlap, stated that burlap burns readily only if exposed to an intense heat and if not piled or baled. An experiment made in court by igniting a small quantity of burlap demonstrated that it flashed up quickly for a few seconds, but immediately died out. It is very difficult to burn burlap when piled or baled. If baled it is practically impossible to burn it out of sight. One witness with long experience in the burlap

business testified that he had seen baled burlap come out of the hold of a ship where there had been fire for considerable time and estimated it would take a week for a bale of burlap to burn. In a recent fire in another bag factory, the building was practically burned down, yet bales of burlap which had fallen through the floors could still be identified. A Class C building, such as the one housing plaintiff's factory would be consumed before the baled burlap.

No great damage was done to the building or to the machinery. The principal burning was in and around the stair well and in the ceiling of the fourth floor and the roof above." (Vol. I, p. 183.)

Radford testified definitely as to the debris that was hauled away, and also as to the fact there was no merchandise obliterated, and that there was no merchandise which could not be identified.

"* * * 34 or 35 loads of merchandise were hauled from Sacramento street to Green street. No, I am not including in that total the load that Mr. Sugarman sent away. Yes, I am referring now just to the loads that went out under my direction. *No, there was not any merchandise that I found at Sacramento street which could not be identified. No, I did not find any evidence that merchandise at Sacramento street had been obliterated.* No, there was not anything said to me at any time concerning any claim as to merchandise having been burned out of sight or destroyed. Yes, I did remove debris from the Sacramento street plant. Well, the debris was removed in this manner, that when we started to

truck the bales from the basement, the floor was covered with sawdust, and we had to move that sawdust to one side, and we made probably small piles of it so that we could truck the merchandise out. The same occurred on the first floor; we removed the sawdust—I should not say sawdust, shavings is what they were—there were ten or twelve of these garbage cans in the place, we would fill those garbage cans up with shavings—I am speaking now, first, of the basement and the first floor—we would load those cans and set them out on the sidewalk, and they were picked up at different intervals by the scavenger people. I would say that a pick-up was made, well, perhaps daily, I would not say for sure whether it was daily, but at least every other day those cans were emptied by the scavengers. There were ten or twelve of those cans. As to whether there was any other debris outside of sawdust or shavings removed, well, on the upper floors there were shavings, and glass, and pieces of timber, and possibly sweepings, but not very much of that removed at that time. No, there was not any merchandise, or remains of merchandise included in the debris removed by me or under my direction." (Italics ours.) (Vol. V, pp. 2520-21.)

AS TO THE RADFORD INVENTORY.

Immediately after the fire, a party named Radford was employed, apparently by R. V. Smith, the adjuster for some of the insurance companies, and by Sugarman, to make an inventory of the stock. He came from Los Angeles, where he had done consider-

able work for the referee in bankruptcy. He was instructed by the adjuster to make an absolute complete check of everything in the building, and that if there was anything so damaged that he could not positively identify it to call it to the adjuster's attention. This is shown by the testimony of both Smith and Radford, and is corroborated by the testimony of Sugarman. In this connection it is interesting to note that Mr. Smith was anxious to do everything possible to legitimately build up the amount of the inventory. (Vol. V, pp. 2633, 2634.) His reason for doing this was that he was anxious to hold this appellee and the National Liberty Insurance Company. Sugarman, of course, was interested in building up the amount of the inventory and amount of loss, as his employment was based on a percentage of the amount of recovery. Radford's inventory was so careful and complete that appellant accepted it and swore to its accuracy in adopting a copy of it as a part of his schedule attached to each of the proofs of loss. Radford had work sheets on which he tallied each bale and each package of cut material as it was removed to the truck to be taken to the Green Street warehouse. Attached to each of these bales was a tag setting forth the lot number, the number of the bale and the type of the material. Mr. Sugarman was familiar with what Radford was doing and saw him making up these work sheets.

> "I remember very well seeing Mr. Radford taking the inventory. Yes, sir, I remember seeing Mr. Radford supervise the transportation of the merchandise. He had a clipboard in his hand

with some sheets on it—this was going on at the entrance to the Hyland Bag Company on Sacramento Street—he was going up and down through all the floors; and he would run over in his car, after the various loads, to the Green Street warehouse; he was giving instructions to the men over there as to the piling of the goods, and the airing of them; then he would come back to Sacramento street in time to get the other loads off." (Vol. II, p. 977.)

"I won't say Radford had a clip board when I saw him at Sacramento Street, but he had a board with some inventory sheets on it; to the best of my belief, he had sheets like that, to make memoranda on. As to his checking out the various items that were taken away from Sacramento Street, I don't know how he checked it, I didn't look over his shoulders; I know he was keeping tab." (Vol. II, p. 1014.)

In addition to these work sheets he prepared a bill of lading for each load before it left the Sacramento Street plant. These bills of lading were made out in duplicate and a copy went with the load to the Green Street warehouse for checking by Davis, Sugarman's man, who received these goods. There was an error on one of these sheets which was returned to Radford for correction. This one error consisted of giving the wrong lot number to one bale. (Vol. V, p. 2511.)

These bills of lading were produced from appellant's files and marked Defendants' Exhibit EE. (Vol. III, pp. 1585-6.) They were withdrawn by Mr. Taylor and later produced by him and marked Defendants' Exhibit FF.

"Mr. Taylor produced the Radford delivery receipts previously marked 'Defendants' Exhibit EE' which had been withdrawn by agreement, and the same being offered by defendants as the Radford bills of lading, they were received in evidence as one exhibit as Defendants' Exhibit FF. These receipts or bills of lading were prepared by Mr. R. D. Radford in connection with the removal of the salvaged merchandise from 243 Sacramento Street to the Baker-Bowers warehouse on Green Street. The characteristics and contents of the documents sufficiently appears from Mr. Radford's testimony, infra.

Permission of Court and counsel was given to Mr. Schmulowitz to withdraw the carbon copies of every bill of lading where there is a carbon copy and to make a copy of the original where there is no carbon copy." (Vol. III, p. 1593.)

As will be noted, not only the originals but the carbon copies were in appellant's files, and this information was not available to appellee until these documents were produced while Mr. Taylor was on the stand.

Not all of the goods were removed to the Green Street warehouse. Some of them remained at Sacramento Street. This merchandise is shown on pages 22, 23 and 24 of the Radford inventory. (Plaintiff's Exhibit 42, Vol. I, pp. 361, 375-6-7.) After the removal of the goods to Green Street, Radford went to that location for the purpose of inventorying this merchandise. As it is stated in appellant's brief:

"Radford took the inventory of the salvaged merchandise. (Vol. V, pp. 2503-4.) After the merchandise had been piled in the building he

was unable to go ahead and make an inventory and state the correct grade of burlap, he was not an expert in burlap. (Vol. V, p. 2525.) He was given the assitance of a man named Gus Kraus; they went straight through, and Mr. Kraus would state the grade and count the number of bolts and call the total number of yards in each bolt to him, and he would record it. (Vol. V, p. 2525.) He demanded prices on the inventoried merchandise from Mr. Taylor. (Vol. V, p. 2528.) He took the word of Mr. Kraus as to the amount and grade of each lot of burlap." (Vol. V, pp. 2588, 2591.) (Appellant's Brief p. 84.)

The reason that Radford could not take this inventory was that the tags had been removed from the bales, the bales had been opened and the bolts stacked in piles. Radford had arranged to have the damaged and undamaged goods piled separately. As a matter of fact, we find that while he was working there the goods were moved around and the damaged mixed with the undamaged. Radford made no pretense of knowing anything about burlap, its weight, grade or value. The man Kraus, who assisted him, was an employee of Hyland, and detailed for that purpose, and later appeared as a witness for appellant. Radford took his word as to the type and grade of burlap, and a tag was attached to each pile, giving it an inventory lot number and attached to this tag was an adding machine slip showing the amount of yardage in each bolt and total yardage in the lot. (Vol. V, p. 2525.) Although Ledgett tells us that a man knowing burlap could tell the difference between the various grades with his eyes closed, we find that

the grades of burlap were increased in order to raise the values and thereby enhance the damage claimed in the proofs of loss. For instance, in the Radford inventory there is included 114,638 yards of what purports to be 36″-9 oz. burlap. Mr. Taylor, who priced this inventory, knew that they had no 36-9 burlap and yet it did not excite any suspicion in his mind when he put these prices on this inventory knowing they were to be used in making up a proof of loss.

> "On the Radford inventory, items 37, 38, 41, 43, 78 to 94, inclusive, 97 to 108 inclusive, 117, 118, 180 to 183, inclusive, 227, 235, 236, 237, 242, 243, 247, 248, 249, and 250 to 254, inclusive, 325, 350, all refer to 36-inch 9-ounce burlap. I don't recall any 36-9-ounce burlap on hand May 31, 1929. I do not recall any purchase of 36-9 subsequent to May 31. I believe we did not have on hand at the time of the fire any 36-9-ounce burlap. No, it did not excite any suspicion in my mind when I was called upon to put prices on 114,638 yards of 36-inch 9-ounce burlap when I knew that we had not had or purchased any burlap corresponding to that description. I did put prices on that burlap. I did know that those prices were to be used in making up a proof of loss to submit to these insurance companies." (Vol. III, pp. 1528-9.)

There was also included in the Radford inventory 86,091 yards of burlap which was listed as 40-10. Taylor knew he did not have any such quantity of 40-10, but yet again he had no hesitancy in pricing this quantity on the basis of its being material of that character.

"Items 39, 40, 42, 109, 110, 116, 119, 179, 185, 186, 187, 188, 191 to 200, inclusive, 202 to 217, inclusive, 219 to 223, inclusive, 239 and 240, and 245 refer to 40-10-ounce burlap. We had a very small quantity in the plant at the time of the fire. I don't believe we had 86,091 yards of 40-10 burlap on hand at the time of the fire, from the books. According to the corrected Hood & Strong inventory report showing an apparent inventory on October 19, 1929, at 243 Sacramento street, we had 2414 yards of 40-10 burlap, that sounds about right. I did, yes, price these 86,091 yards as representing 40-inch 10-ounce burlap. Yes, that was supposed to have been in the plant at 243 Sacramento street on October 19th. That did not excite any suspicion in my mind, not at that time. Yes, sir, at that time I knew I was preparing these figures to be incorporated in a proof of loss." (Vol. III, pp. 1529-30.)

He knew that neither his books nor the Radford bills of lading showed that he had any 36-9 burlap. (Vol. III, p. 1532.) By grading 40-8 burlap as 40-10 the value of this burlap was increased 1¾¢ per yard, or a total of $1905.15. By increasing 36-8 burlap to 36-9 he increased the value ¾¢ per yard, thereby adding to the damage. Radford also testifies that his bills of lading did not show any 36-9 or 40-10 burlap as being removed from Sacramento Street. (Vol. V, p. 2517.)

He does show, however, that there was 116,000 yards of 36-8 removed from Sacramento Street, and 49 bales, or 98,000 yards of 40-8. (Vol. V, p. 2518.)

Radford stated that some of the bales in the basement were wet, that on the first floor there might have been some where the covers were damp. (Vol. V, pp. 2518-19.) He also states that of the bales removed from the second floor there were two which showed signs of fire on the side and top. (Vol. V, p. 2519.)

By applying Sugarman's figures of percentage damage which are used in the schedule attached to the proof of loss, this of course, greatly increases the claim for damage to this material.

Radford's inventory gives us an interesting check on the question of merchandise burned out of sight, or totally destroyed. On his work sheets he made a note of all damaged material leaving the plant. He states:

> "If merchandise was damaged I so indicated it was damaged on the work sheets." (Vol. V, p. 2513.)
>
> "A. This damage will not include any water damage.
>
> Q. You say the damage will not?
>
> A. To the various bales of burlap.
>
> Q. I am asking you about the fire damage.
>
> A. On page 11, I am reading from the top of the page, Flat No. 1, that is indicated there as the first flat that was removed, 18 bolts of damaged burlap; Flat 2 calls for damaged cotton liners, 36-6-15 this does not state the quantity that might have been on this particular flat—Flat 4 is damaged burlap sacks incomplete. They were stamped Hyland Diamond. Flat No. 5 was 17 bolts of damaged burlap, Flat No. 6, 16 bolts

of damaged burlap; Flat No. 7, was 9 bolts of damaged burlap; Flat 8, was 17 bolts of damaged burlap; Flat 9, was one flat of damaged burlap sacks incomplete—'incomplete' probably indicates that, or does indicate that they were what we term cut but not sewed. Now reading from page 12, Flat 10 is one flat of damaged sacks incomplete. Flat 11, 20 bolts damaged burlap; Flat 12, 15 bolts of damaged burlap; Flat 13, 19 bolts of damaged burlap; Flat 14, 18 bolts of damaged burlap. Flat 15, 18 bolts of damaged burlap. There does not appear to be any on page 13 or 14. There is none indicated on page 15. On page 16 the last item, there is one roll of burlap. I believe that that was scorched, but it does not indicate its condition. There is no language here regarding it (as to what language refreshes my recollection). No, no language on page 16. It calls for one roll of burlap. I would say there is no indication it was damaged, but if my memory serves me right I believe it was slightly damaged, scorched. That is all I find. I do not find any indication of any burlap or sacks damaged by fire excepting on pages 11 and 12. On pages 11 and 12 I find a total of 15 flats that show indications of damage by fire. Yes, confined to pages 11 and 12. Yes, those do represent the total number of flats, or the total of merchandise removed from 243 Saramento street, showing evidence of fire damage, with the possible exception of a roll or two, I would say, I believe there were a couple of rolls, or maybe there was a total of 7 rolls removed; I know that there were some of them scorched, they were not damaged very bad, they were scorched.

As to flats, in the picture, Defendants' Exhibit F, that is a flat in the left-hand bottom of the photograph. Referring now to the picture of the mezzanine floor, and pointing to a wooden platform, yes, I believe they classify them as lift truck platforms; that is what I refer to in my work sheets as flats. There were fifteen of those with material represented by the description in my work sheets that were removed from 243 Sacramento street, that showed evidence of fire damage, that is correct. No, I do not remember approximately the size of those flats. I couldn't give you the dimension of them, but I can tell you about what they would hold, if that is what you are interested in. They probably would hold 2000 yards of burlap, or 2000 yards of sheeting, or 2000 sacks, maybe more or less. Yes, depending, as you suppose, on the type of sacks." (Vol. V, pp. 2515, 16, 17.)

In other words, the only damaged material that Radford found and removed were these 15 flats holding 2000 yards each, or a total of 30,000 yards of burlap damaged by fire. In addition there were the two bales removed from the second floor. If we grant all the burlap in these were damaged by fire, it would be an additional 4000 yards. There was some damage to two rolls which if it did show damage to all the material, would mean an additional 4000 yards, or a total of a maximum of 38,000 yards of burlap showing any fire damage.

Incidentally, this Radford inventory absolutely disproves appellant's claim as to any material amount of merchandise burned out of sight. The records of

Hyland show that on the date of the fire there were 190,571 bags in process.

It will be remembered that Exhibits AAA, BBB and CCC, (Vol. IV, pp. 2290-1-2), which were Hart's copies of the recapitulation sheets of Taylor's perpetual inventory, and his copy of the sheet showing bales of burlap at Sacramento Street on October 19th, have never been questioned. On Defendants' Exhibit BBB, we find that the recapitulation of sheet seven shows 190,571 bags in process. This sheet also contains the figure of 61,570 domestic bags. Turning now to Defendants' Exhibit J, which is the inventory taken by Taylor and Ledgett at Sansome Street, on the morning of October 21st, we find on page three that there are 136 bales, amounting to 68,000 domestic bags. On the bottom of this sheet we find certain figures corresponding to those heretofore given, namely, the 68,000 representing domestic bags at Sansome Street after the fire, 61,570 representing domestic bags at Sacramento Street, and 190,571 representing bags in process at Sacramento Street. It is true that Taylor tried to explain these figures by stating that they must have been obtained from Radford's inventory. However, we find that on Tuesday, July 15, 1930, at a time when he admits that his memory was much clearer as to the evidence of 1929, he testified:

> "We had 190,571 bags in process of going through the factory on the Saturday night of the fire." (Vol. III, p. 1546.)

Radford's inventory, however, showed a total of bags in process inventoried by him after the fire of

189,392. This figure was tabulated and checked by Mr. Parker, the accountant for appellant. In other words, out of a total of bags claimed by appellant to have been in this building in the course of process before the fire, all but 1139 are accounted for after the fire. Radford confirms this as he testifies that after he had given Taylor a copy of his inventory Taylor informed him that he was only a few bags off. (Vol. V, p. 2605.)

During the removal of the goods, Radford testified that he checked with Taylor or Ledgett as to the merchandise on every load that went out.

> "* * * I went up and ascertained from Mr. Taylor and Mr. Ledgett how many bales of that particular kind of burlap were supposed to be in that particular lot.
>
> Mr. Schmulowitz. Q. You did that every time you came to a lot number?
>
> A. *On every load.*
>
> Q. They told you they had a perpetual inventory?
>
> A. Yes.
>
> Q. Didn't they tell you they had stock sheets?
>
> A. It was the same thing.
>
> Q. It was the same thing to you, was it?
>
> A. Yes.
>
> Q. Did they use the words 'perpetual inventory'?
>
> A. I believe they did.
>
> Q. Didn't they use the words 'stock sheets'?
>
> A. Well, they might have used both.
>
> Q. They might have used only 'stock sheets'?
>
> A. Well, I would not say that.
>
> Q. Did Mr. Taylor inform you that stock sheets frequently had errors?

A. No, as a matter of fact he told me they were accurate, said there was very little chance for error.

* * * * * * *

"I did not run to every bale. I did not tell you I did. Yes, I just checked occasional ones, I went upstairs to find out how many bales were supposed to be in that lot. Yes, I personally did that with Mr. Taylor several times during the day. Yes, I did. As to that being quite vivid in my mind, pretty clear. As to, Mr. Taylor would turn to the stock sheets and check the particular numbers and say, 'That is right, Mr. Radford'—not always Mr. Taylor, sometimes Mr. Ledgett would determine how many bales there were. Yes, Mr. Ledgett would go to the stock sheets and check with me as I was making out these bills of lading, or after I had made them out." (Italics ours.) (Vol. V, pp. 2564-65.)

"Yes, I did make a check as to baled goods or other merchandise upon completing removal of those goods from Sacramento Street. I made that check with Mr. Taylor and Mr. Ledgett. As to what, if anything, was determined by that check, the exact amount or quantity of the various bales in the lots carried by them, or of the corresponding lots, or the lots that corresponded with the tags that were attached to the various bales. As to, was there anything said as to the quantity of the bales that I had removed, I made this check at various times with Mr. Taylor and Mr. Ledgett, to ascertain if I had removed the entire lots of any particular kind of merchandise, for instance, if there were twenty bales of, we will say, of any grade of burlap in the basement, I would ask him or he would tell me—he would

refer to his stock sheets or perpetual inventory, and tell me how many bales there were supposed to be in that particular lot, and in that way I would know that I had removed that complete lot. As to, did I make any final check on the total, well, I did after the completion of the inventory. Yes, that was after the completion of the inventory." (Vol. V, pp. 2521-22.)

"Q. Yes, and *in the inventory you have included only the material that was salvaged, isn't that correct?*

A. *All of the merchandise in the building.*

Q. What is that?

A. All of the merchandise in the building.

Q. That was salvaged, isn't that correct?

A. No, *all that was in the building.*" (Italics ours.) (Vol. V, p. 2609.)

R. V. Smith, the adjuster for some of the companies, also testified:

"Mr. Thornton: Q. Mr. Smith, did you on any of these floors that you have described or on any other floor see any indication of any merchandise having been burned out of sight?

A. There was no merchandise that was burned out of sight. There was no merchandise in the radius—no evidence of any merchandise in the radius of the fire that could have been burned out of sight.

Q. Was there any evidence of any merchandise having been burned out of sight in any portion of that building?

A. None, whatever.

Q. Was there any place pointed out to you, or did you make any inquiry as to any portion of

the building in which any merchandise was claimed to have burned out of sight?

A. *Many times I challenged Mr. Sugarman or Mr. Hyland to show me one place where there was something burned out of sight.*" (Italics ours.) (Vol. V, p. 2691.)

AS TO EVIDENCE OF ACTUAL DAMAGE TO THE MERCHANDISE.

As we have just pointed out, Radford has stated that there was no merchandise obliterated or so damaged that it could not be identified, and that every bit of merchandise was inventoried, either in the plant at Sacramento Street or in the Green Street warehouse. He was asked as to the percentage of the merchandise which was undamaged and testified as follows:

"Mr. Thornton. Q. From your experience during the time that you were at the Green Street Warehouse, could you estimate the amount or percentage, not asking you to place it in yards or dollars, of merchandise at Green Street which was undamaged?

* * * * * * *

A. You mean undamaged?

Mr. Thornton. That was undamaged in any respect.

A. I will say, I did not actually figure it out, but it would be safe for me to say 75 or 80 per cent.

Q. 75 to 80 per cent of the merchandise at the Green Street Warehouse would not show any damage of any kind: Is that correct?

A. That is correct." (Vol. V, pp. 2532-3.)

Smith testfies that before proofs of loss were filed, he met appellant and Sugarman at the Green Street warehouse, that Hyland claimed he could not use any of the merchandise and that he was going to claim a total loss. Hyland refused to proceed with an adjustment and Sugarman suggested that Smith go through the merchandise, put down his idea of the damage and that perhaps they could get together. He did this and that Sugarman told him there was no chance to get together as Hyland had already told him what was wanted. (Vol. V, pp. 2606-7.)

He states that he went through the various lots as shown in the Radford inventory, marking "F.D." where there was any fire damage, "W.D." where there was any water damage, and "O.K." where there was no damage, and setting forth the percentage of damage which he estimated on each of the lots shown in that inventory. (Vol. V, p. 2708.) He showed these percentages to Sugarman, who was with him part of the time. (Vol. V, p. 2709.) This instrument which he prepared at Sugarman's request, and showed him before the proofs of loss were filed, was introduced in evidence as Defendants' Exhibit TTT. (Vol. V, pp. 2710-2721.) He states that Sugarman prepared all the prices, the only thing he put on was the percentage of damage and pencil notation showing the cause of the damage. (Vol. V, p. 2709.) This witness then prepared a document showing a comparison between the claim of the Hyland Bag Company and the amount of loss and damage as he ascertained it. This was introduced in evidence as Defendants' Exhibit UUU. (Vol. V, pp. 2723-44.)

It is interesting to note that there was no attack of any kind by appellant during the course of the trial and no evidence introduced to contradict or refute these statements. In this exhibit Smith gave effect to the fact that 36-9 burlap should actually be 36-8, and that 40-10 should be actually 40-8. (Vol. V, p. 2745.) The first sheet is a recapitulation sheet in which he takes each of the pages and shows the cost and loss as claimed by Hyland and what he designates as the actual cost and loss. He states, however, that the cost as shown by him under the column headed "actual" is too high.

> "Yes, that cost is too high, in view of the testimony that has already gone in here from the Bemis Bag Company." (Vol. V, p. 2811.)
>
> "For a long time I couldn't get any prices around this burg. Because of Mr. Hyland going around and asking people not to give me prices." (Vol. V, p. 2812.)

And yet, with these prices which he admits are too high, he finds an actual value of this merchandise of $66,626.05, and an actual loss of $10,171.92. His method of determining these amounts is set forth on the other pages, which represent the Radford inventory, showing the unit cost, total cost, precentage of damage and loss as claimed, and also showing what he sets forth as the actual unit cost, total loss, percentage of damage and loss.

As we have shown, he did not know that Mr. Wyckoff and Mr. Young had made an itemized list showing the damaged and undamaged merchandise.

(Vol. V, p. 2750.) As a matter of fact, his percentages of damage were made before they saw the burlap.

Mr. Sugarman was called on rebuttal, but he did not question Mr. Smith's testimony. As a matter of fact, he corroborated it to the extent of testifying he was present at the time that Smith ascertained these percentages for damages.

A copy of this exhibit UUU was furnished to the attorney for appellant upon his statement that he would like to have it checked by his accountants. Evidently a check was made, as Mr. Hyland, when called on rebuttal, referred to a net shortage of $2.13 shown on the recapitulation sheet, and stated that a check showed that Mr. Smith was in error as to that amount, and yet there was no attempt made to attack Mr. Smith's testimony relative to values, percentage of damage, or the totals arrived at by him. It is also interesting to make comparison between his figures and those presented by Young and Wyckoff, and to find that in the one or two instances where Smith does not absolutely agree with them, although he did not know of their visit or of their work, the disagreement is caused by the fact that he has allowed damage where they found there was no damage to the material.

John J. Parker was called as a witness by the appellee and testified that he was Traffic Manager for Bemis Bros. Bag Company, that in the course of his duties he passes on damaged burlap for that company. That he was instructed to examine the Hyland burlap

at the Green Street warehouse. (Vol. IV, p. 2244.) He further states that 75 to 80% of the burlap was good, excluding that which showed fire damage.

John W. Wyckoff, then factory superintendent for Ames-Harris & Neville, was called. He testified that he had had occasion to determine damage on burlap in adjusting claims for his company. (Vol. IV, p. 2189.) He went to the Green Street warehouse in company with Mr. Young of Bemis Bag Company. There he examined every pile of burlap, except a few which were damaged badly, and he examined every pile of good burlap on either three or four sides to see if he could discover any stain or burn. (Vol. IV, p. 2191.) He found quite a few bales tagged as 40-10 which he put down as 40-8. He also found some tagged as 37-10 which he put down as 37-8. He also found quite a few bales marked 36-9 which he questioned as it might have been 36-8. (Vol. IV, p. 2192.) He states there were maybe ten or twelve piles that were pretty badly burned or stained from which they could get no salvage from a new bag manufacturer. (Vol. IV, p. 2193.) As he examined this merchandise he wrote down a report to submit to his employers. (Vol. IV, p. 2193.) Where he reported material was good he meant he figured it as new goods and they could take it in and use it as such. (Vol. IV, p. 2194.) He marked some of the bags as being "patched and pieced" and "some dirty". (Vol. IV, p. 2195.) He reported some burlap as stained and marked two items as "bad". (Vol. IV, p. 2196.) He went over those goods lot by lot and pile by pile, reading off the number and the yardage, and noting the type of damage, as he was

looking for damage. (Vol. IV, p. 2197.) The transcript sets forth in detail the lot number and the fact as to whether they showed damage or no damage. (Vol. IV, pp. 2198-9, 2200.)

On cross-examination it was shown he considered 75 to 80% of this material as good. (Vol. IV, p. 2201.) As a matter of fact, out of the 73,226 yards of cotton sheeting which he reported as good, he stated that Ames had used 40,000 to 50,000 yards of it for new liners for sugar sacks. (Vol. IV, pp. 2195-6.) They paid 4¢ a yard for this sheeting which was ⅛¢ below the market price of the date of purchase. (Vol. VI, p. 3033.)

C. T. Young, the superintendent of Bemis Bag Company, was called and corroborated the testimony of Mr. Wyckoff as to their inspection and making a list of the merchandise at the Green Street warehouse. (Vol. IV, p. 2235.) He stated they figured this stock the same as they would have a bankrupt stock instead of one that had gone through a fire. (Vol. IV, p. 2235.)

As we have already pointed out, these witnesses knew nothing about Smith, and yet they agree with him, except in one or two instances, where he allowed damage which they did not ascertain although they were there representing their companies for the purpose of ascertaining the amount of damage and making recommendations as to whether or not their employers should purchase these goods. A summary of their report shows they found 340,507 yards of material absolutely undamaged. They also found 167,-

948 bags undamaged. As we have before pointed out, there were 190,571 bags in process at the factory at the time of the fire. Of these, the Radford inventory accounts for 189,362. Young and Wyckoff find at the Green Street warehouse 167,948 of these bags absolutely undamaged. In view of this showing it is easy to understand why the trial judge stated:

> "The heart of the plaintiff's contention is that large quantities of goods were burned out of sight." (Vol. I, p. 182.)

and

> "Not only does the proof show negatively that there was no substantial quantity of merchandise obliterated by the fire, but it shows affirmatively that the amounts claimed were fraudulently built up." (Vol. I, p. 186.)

and

> "What I have said about the impossibility of an out of sight loss in this case establishes that the claim of $15,000 worth of goods obliterated as well as the subsequent claim of a larger amount were alike fraudulently excessive.
>
> There was lack of good faith in fixing the proportion of loss on the salvaged goods. I have referred to the fact that disinterested witnesses have testified that this merchandise was damaged not in excess of 25%. Yet a loss of $53,586 was claimed on this." (Vol. I, p. 191.)

AS TO PRICING OF RADFORD'S INVENTORY AND PROOF OF LOSS.

We have already shown that this pricing was done by Taylor at Hyland's direction. We have also shown that in pricing that inventory Taylor put down prices on 114,638 yards of 36-9 burlap, knowing that they did not have and had not purchased any burlap of that description, and also knowing that when he put those prices on the inventory that they were to be used in making up proofs of loss to submit to these insurance companies. (Vol. III, p. 1529.) We have also shown the same situation relative to Taylor's pricing 40-10 burlap.

Referring to the testimony of appellant, it will be noted that on cross-examination he was testifying as to various data from a card in his possession. This card was received in evidence and marked Defendants' Exhibit B. (Vol. I, p. 440.) It was in appellant's handwriting. It will be noted that the first item shows that the merchandise at Sacramento Street at *"landed costs"*, amounted to $132,947.44, and that the merchandise *"obliterated or O o sight"* amounted to $46,139.46. On being questioned concerning this exhibit Hyland said:

> "Yes. I have made notations from various reports of auditors, from which I have been testifying, *and which figures, I may add, I knew to be correct from my own personal investigation.*" (Italics ours.) (Vol. I, p. 441.)

When further questioned as to the pricing being on the basis of landed cost, he testified:

"Mr. Thornton. That value of $102,453.23, what value does that represent? Does it represent the replacement cost of that merchandise on October 19?

A. I believe that that represents the landed cost to us. I cannot state positively, as the work was all done by Mr. Sugarman and by Mr. Taylor." (Vol. I, p. 526.)

"Yes, we always pay attention to Calcutta prices. I believe you are correct in your question that there are on file in the individual customs houses the Calcutta prices sent each day by the Consul in Calcutta, but I cannot state positively. At various times, yes, we receive cables and telegrams relative to prices. We very often had cables oftener than once a week. Sometimes every day, probably.

The prices set forth in that proof of loss represented our actual cost, to the best of my recollection. That is to the best of my belief. I don't know that to be an actual fact. I had nothing whatever to do with making that up." (Vol. I, p. 527.)

When he was confronted with the schedule attached to his proof of loss, he testified:

"I cannot state 'whether any of the prices set forth in that schedule represented the actual value on October 19.'" (Vol. I, p. 528.)

"Q. Can you tell us anything about the values which you set forth as to manufactured bags?

A. I did not set forth these values. I can only repeat that Mr. Sugarman and Mr. Taylor handled the entire thing. I personally had nothing whatever to do with it.

Q. Then you could not look at this inventory or at this proof of loss and tell us whether or not the values set forth as to cotton sugar liners, or A.B.S. sacks, or beet pulp sacks, or any of the other sacks included in there, are correct?

A. It is my understanding that they were, or I would not have signed it. The work was left entirely in the hands of Mr. Ben Sugarman and Mr. Taylor.

Q. Did you examine them to see if they were correct?

A. I did not." (Vol. I, p. 529.)

It will be noted that in this testimony he endeavored to hide behind Taylor and Sugarman. It has also been stated he was not at all active during the two or three years before the fire. However, we find him testifying as follows:

"As to what duties I performed on behalf of the Hyland Bag Company during the years of my ownership of it, with particular reference to the three or four years immediately preceding the fire, I personally handled all of the large purchases. To explain that, Mr. Ledgett, who acted as purchasing agent, only handled the small local stuff, the small purchases. The large purchases, consisted of 90 per cent. of all the materials that we were using in our factory and I handled those all. In addition to that, I personally for three or four years prior to the fire, handled every sale that was made there, and the sales would average per year well over $2,000,000.00. So you can well appreciate the fact that in handling all these details that I could not possibly have handled everything else, such as watching the insurance,

doing the bookkeeping, and everything else. It was not possible." (Vol. I, pp. 546-7.)

"I personally handled purchases of burlap and carload lots of sheetings, etc. As to what I am designating as a large purchase—a quarter of a million yards; a quarter of a million yards of cotton sheeting and similar quantities of burlaps. Yes, if there was a purchase to be made involving 100,000 yards of burlap I would personally make that; I handled all of the purchases from Calcutta, all of the Calcutta purchases. Not as a rule did I purchase goods locally. Occasionally when we found ourselves short we might pick up some locally, yes; if Mr. Ledgett was not available at the time I would not handle it. As to that being in one or two bale lots, that would be in smaller quantity lots. It all depends on what we require. Oh, no, not at all would Mr. Ledgett enter into contracts involving 500,000 yards, or more. Any contracts totalling that amount would have been entered into by me personally. Yes, I would be familiar with the prices on those contracts. Yes, sir, I personally handled all sales. I mean by that practically all the sales; there might have been an occasional order brought in by Mr. Ledgett that did not amount to a great deal in volume of dollars. I handled practically all of the sales of the Hyland Bag Company, all of them. I mean all sales of bags, and burlaps, as well. I was familiar with the prices on those sales. Quite so, I would be familiar with the prices as to sales to the American Beet Sugar. I do not endeavor to memorize those things, however. Once a transaction is finished there is no occasion for me to memorize it at all. At that time, October 19th,

yes, I was familiar with those prices. As to whether, as you ask, I had forgotten the October 19th prices upon the 24th day of December, of bags and burlaps, I never try to memorize prices. There was no occasion to do so. We had our price sheets to refer to. They were always there. I do not recall whether I referred to them at the time I signed that proof of loss, except that I can say that that proof of loss, as I have told you dozens of times, all of the detail work on that was handled by Mr. Sugarman and by Mr. Taylor. I had nothing whatever to do with it" (Vol. II, pp. 574-5-6.)

Yet prior to that time he told us:

"As to being familiar with the value of burlap, I am fairly so. *I was familiar with the value on October 19, 1929, and I am today.*" (Italics ours.) (Vol. I, p. 526.)

On rebuttal, when he thought he needed evidence to contradict our expert, he professes to know values. (Vol. VI, pp. 3296-7.)

He had already given a number of figures as to values and admitted that these were from the Bemis price list. (Vol. II, p. 576.) In other words, instead of being landed or replacement costs these figures were the prices at which anyone not in the trade could go in and purchase one of five bales of burlap. (Vol. II, p. 577.) In these figures were included the profit that Bemis would have made on a retail sale. He claims that he was not thoroughly familiar with the schedule attached to the proof of loss, nor was he thoroughly familiar with the Radford inventory, he had looked it

over just casually. (Vol. I, p. 446.) Yet, he did appear before a Notary Public and swear to the correctness of the statement. He knew the schedules on the proof of loss were prepared for the purpose of presenting the same to the insurance companies and for the purpose of making claims under the insurance policies. He caused these proofs of loss to be presented to the insurance companies for the purpose of collecting the money. (Vol. I, p. 442.)

When Sugarman was called as a witness for the appellant, he testified:

> "I agreed with Mr. Smith that it should be priced upon the replacement value in San Francisco at the time of the fire, and we agreed that we would add, in determining that cost, a fraction of a cent, I cannot remember at this time what that fraction was, to take care of cables, and other overhead that went into the purchase of this merchandise." (Vol. II, p. 980.)

> "Answering your question, it is possible that it was one-half cent over the five-bale price, but I am not positive. *I want to correct that, there was no discussion as to a five-bale price with Mr. Smith. No, there was no discussion with Smith on the five-bale price.* There was a discussion with Mr. Smith for the addition of a fraction of a cent over the market price with particular reference to cables and other expenses that we specially referred to. Yes, cables were referred to as the reason why that fraction of a cent would be allowed over and above the market price. Cables and other things were referred to." (Italics ours.) (Vol. II, pp. 980, 981.)

He further states:

"I had nothing to do with the pricing of this inventory, that is the unit cost of burlap or of bags, only in so far as I conveyed to Hyland the result of my discussions with Smith, and Hyland showing me the Bemis price list. Mr. Hyland showed me that, yes. I don't know whether he produced it from his files, but he showed it to me in his office. I did not instruct him to price that on the five-bale lot list appearing on those Bemis price lists, but I advised him that I thought that would be the proper method of pricing it." (Vol. II, p. 1004.)

"After the Radford inventory was returned to me with certain prices on it, I did not check over those prices, either as against that Bemis price list or as against landed costs. I had no knowledge as to whether that price list was based on a higher figure than on one-bale-lot cost in the Bemis list. *I had no knowledge of Hyland's landed cost.* I don't know that Mr. Hyland was not a retail buyer. I knew he was a buyer of a lot of burlap. I knew he was buying in India because I took up the question of telegrams and cables. I knew that he was a big buyer of burlap. Yes, I accepted the figures as given to me by the Hyland Bag Company and extended those figures and incorporated them in the schedule in the proof of loss, of course I also knew that as to some of that merchandise he perhaps could not have replaced it at the time of the fire without going to foreign markets. Yes, I made inquiry about that, I asked Mr. Hyland about one item. No, sir, I did not inquire from Bemis or from Ames-Harris if they had large stocks on hand. As to inquiring from

Bemis or from Ames-Harris as to landed costs, *I inquired of no one as to landed costs.*" (Italics ours.) (Vol. II, pp. 1005-6.)

Smith says:

"Sugarman brought this schedule into my office and told me that he had the prices filled in on the inventory, and wanted me to go to the Baker-Bauer Warehouse and down to Sacramento street, and go over the stock with him and Mr. Hyland for the purpose of making an adjustment. He said that this was what the merchandise was priced at by Mr. Hyland. I asked him what information he could give me to support those prices. I asked him if he had any quotations which Mr. Hyland had received with the date of the bill which would verify these prices. I told him that I was entitled to that information. He told me that I was not entitled to that information, that Mr. Hyland would have to show me all his prices to verify these prices, or else they would have to be changed. We could not agree on the prices, and he could not give me the supporting information that I required on the prices." (Vol. V, p. 2706.)

"They filed the proofs of loss about the 24th or 25th of December, as I recall it. It was a short time before that. They were in my office. *I asked Mr. Hyland at that time how he fixed the prices on that schedule.* He told me that those were from telegrams that he received quoting prices, and they were in code, and he deciphered them properly. I asked him if he did not think it the proper thing to let me have the key to the telegrams, and let me make comparisons on those, so I would have something to check on; I ex-

plained to him at the time that I had been unable to get price verifications from other burlap brokers or other dealers, they were somewhat reluctant about giving me prices; I told him I would have to make some check on it before I could agree to any value. He told me that those were his private affairs, and that was all the information I could have on that subject. *I also asked him at that time if he was satisfied with the grades as well as the prices that he had given me, and he told me that he was, and that I would find that those were 100 per cent right.*" (Italics ours.) (Vol. V, p. 2754.)

"I said, 'If you file a proof of loss and you set up incorrect grades or incorrect quantities, or incorrect prices, and swear that those are the correct prices, you will vitiate your policy contract, and by the terms of the contract you might lose all your insurance.' I said, 'I want to warn you of that.' I said, 'I have called Mr. Sugarman's attention to that, and I want you to know that I told him about it.' I addressed that conversation to Mr. Hyland. Mr. Hyland was a little bit peeved at that and said, 'We will take all the chances on that.' Sugarman said, 'You don't need to worry about that, R. V., we will take all the chances on that, we will attend to that.'" (Vol. V, p. 2755.)

"So that it was after the inventory was completed by Mr. Radford and the items of the inventory were priced that you first had a discussion with Mr. Sugarman on the matter of the addition of one-half a cent per yard on the various items?

A. Yes. In that respect he explained that Mr. Hyland had an office in New York, and I under-

stand that he maintained a clerk or a buyer there, and there were telegrams exchanged between that office and this office, and purchases were made through that agency, and by maintaining that office Mr. Hyland was able to buy cheaper than he could buy here, transacting business here, as the other dealers did, and that gave him an edge on the other dealers. And Mr. Sugarman said that I would not be entitled to that price of Mr. Hyland's, which was through his purchasing power, and I said I would be entitled to his purchasing power—I said the insurance company would be entitled to figure on the loss of what it would cost the insured to replace the merchandise, and I said we did not want the services of his buyer or his organization for nothing, I said, whatever proportion of expense of maintaining that office should be allotted to this quantity of merchandise, that amount could be added as a buying cost, that is, cost of buying is part of the cost of the merchandise, I explained that to Mr. Sugarman, and he thought it would be half a cent a yard, and I told him I thought it would be an unreasonable amount, I said, 'Whatever it is we would be glad to add that,' but we did not agree on it. And, besides, he would not give me the price which Mr. Hyland bought at, he would not give me his low-down prices." (Vol. V, pp. 2815-2816.)

Again we want to call the court's attention to the fact that while Smith did represent some of the appellees, that there is no attempt to show any conversation with any other adjusters.

C. T. Young, who was the superintendent and assistant to the manager of Bemis Bag Company, testified that they made up price lists which were sent to the trade. That on this list there were two prices, from 1 to 5 bales, and 5 bales or over. For 5 bales or over the price would be ¼¢ per yard less. (Vol. IV, p. 2208.) He also stated that an outsider not engaged in the burlap business could come into the plant and purchase 5 bales at that price, that they were willing to give it to anyone who came in and took 5 bales of burlap. (Vol. IV, p. 2209.) He also testified that the trend of the market during 1929 was downward, and has been consistently so ever since. These lists were made up as a guide to the salesmen who could immediately give a discount of ¼¢ a yard on a sale of 5 bales or more. (Vol. IV, p. 2218.)

He further testifies:

> "Regarding having said that I hardly thought Mr. Hyland would have assumed the 5-bale price list as what he would have had to pay for large quantities, and explaining that, generally speaking, this list that has been submitted is more or less what you might call a retail trade list, although we do not have any such term as retail trade. It is made up particularly for very small purchases. Anything that gets to any quantity, even as low as 25,000 yards, we would not consider that list, at all, and I hardly think anyone in the burlap manufacturing business would consider that list. Yes, 'in other words that is general information to the trade'. I would consider it so. Mr. Hyland has been in this business a

number of years, yes. I believe Mr. Hyland was supposed to be a very good buyer."

* * * * * * *

"As to explaining that in making sales in cases of the five bales we would not have considered the price list, merely that we would feel that list would have been too high to have secured any business, therefore we would not have taken that list into consideration had we been desirous of securing a particular order that we quoted on. *As to, then anything in 25,000 yards or up there would have been a reduction from that price list, there would have been.* (Over objection): *As to, would that have been a material reduction, yes, we would have made a material reduction from this price list.*" (Vol. IV, pp. 2227-2228.)

He also stated that they were carrying large stocks in October, 1929, and would have been very glad to have made large sales of burlap at that time. (Vol. IV, pp. 2232-2233.)

He also testified:

"Yes, the selling price that I read off from that sheet of September 30, 1929, was a one-bale selling price. From that there would be deducted at least one -quarter of a cent on five-bale lots. Might I further amplify that, that even at that time if we had an inquiry for five bales, I believe there were verbal instructions to our salesmen to take it up with the salesmanager or the manager for prices; in other words, we may not have adhered strictly to the quarter of a cent reduction, we might have made more." (Vol. IV, pp. 2238-2239.)

We also called Alexander Logie, who had been engaged in the burlap business for over fifty years in Scotland, New York, India and San Francisco. He produced a list of prices of burlap which was introduced in evidence as Plaintiff's Exhibit 137. (Vol. IV, p. 2175.) In this connection he stated:

> "As for saying that these prices that I have quoted in this list (Exhibit No. 137) would be the precise prices at which I would have sold these products to Mr. Hyland on October 19 or 21, 1929, these prices on the list that I have given you are the landed price ex dock, duty paid, including insurance, that Mr. Hyland would probably have had to pay." (Vol. IV, p. 2181.)

As we have pointed out, appellant was not satisfied to attempt to recover ½¢ in excess of the price at which anybody not in the trade could have purchased this burlap, locally and at retail prices, he had to increase the quality of the burlap from 36-8 to 36-9 and 40-8 to 40-10, thereby adding another $6175.06 to the alleged value of this burlap. With all his knowledge of purchases and sales he was still willing to swear to the truth of these figures and present them to these insurance companies for the purpose of collecting a fraudulent claim.

In order that the court may more readily grasp the significance of these prices, we have prepared a tabulation which is set forth below, showing a comparison of values as set up in the proofs of loss and as testified to by Mr. Logie and Mr. Griffits.

In the Bemis list, as presented by Mr. Griffits, there is a slight range in price, and we have invariably taken the higher. He states:

> "The amount of profit we would add would vary, perhaps, I would say, from 1 to 5 per cent. Yes, from 1 to 5 per cent over these prices I have just given you. Yes, when I say 'large quantities' I mean in excess of 25,000 yards." (Vol. IV, p. 2254.)

Kind of Material	Values		
	As per Proof of		
	Loss	Logie	Bemis Bag
31/15	.13⅜	.0975	.0928
36/8	.07¼	.0575	.0549
36/9	.07⅞	.0640	.0619
36/10	.08¾	.07	.0691
37/10	.09	.072	.0702
40/8	.08⅛	.0625	.0589
40/10	.09⅝	.077	.0761
45/7½	.09⅛	.0695	
45/8	.09¼	.071	.0684
40/12	.11¾	.092	.0826
54/8	.11⅛	.086	

We have already pointed out in appellant's testimony that he personally handled all sales, yet we find he swore to a proof of loss setting up value of A. B. S. bags incomplete at $199.65, and yet their net price of those same bags complete, and with liners, was $169.00, or a difference of $30.65 per thousand. (Vol. III, p. 1628.) Other bags were similarly marked up.

AS TO THE NEWHALL "FICTITIOUS CONTRACTS".

It will be noted that in and by each of the contracts of insurance which were introduced in evidence, and which are the California Standard form of fire insurance policy, it was and is provided:

> "The company will not be liable beyond the actual cash value of the interest of the insured in the property *at the time of loss or damage, nor exceeding what it would then cost the insured to repair or replace the same with material of like kind or quality.*" (Italics ours.) (Vol. I, p. 295.)

There had come into our possession a document entitled "Hyland Bag Company, Proposed Merchandise Purchases for Period October 19 to December 31, 1929". This document purported to set forth certain purchases from H. M. Newhall & Co., under dates varying from June 20 to August 20, 1929, of 2,400,000 yards of various types of burlap to arrive in San Francisco from October 15 to November 15, 1929. The landed cost varied materially from the claim as set forth in the schedule attached to the proof of loss. For purposes of comparison, we have prepared a table which is set forth below:

Type of Burlap	Value as Per Proof of Loss	Landed Cost as per Exhibit HH
31-15	.13375	$.0925
45-7½	.09125	.07448
40-12	.1175	.1060
36-9	.07875	.06598
37-10	.09	.07725
40-10	.09625	.08697
Cotton		
36-6.15	.07125	.0553

These contracts were first called to the witness' attention on his original cross-examination, after he had testified to Bemis Bros. Bag Company's 5-bale price as being replacement value as of October 19th. This examination covered pages 579 to 584, and it will be noted that the witness was very evasive. At that time we demanded production of these contracts as they were the only positive evidence that we had been able to obtain up to that time showing overpricing. This witness was recalled by appellant and stated he had made a search for these contracts, but had been unable to find them. Mr. Schmulowitz stated he would stipulate as to the material facts of these contracts and would try to get copies from H. M. Newhall & Co. (Vol. III, p. 1643.)

At the commencement of the cross-examination of the witness D. A. Parker, Mr. Schmulowitz was asked if he was prepared to produce these contracts. He replied that he would stipulate to their contents. (Vol. III, p. 1676.) Parker testified that he had turned these contracts over to Mr. Lilly, of Pace, Gore & McLaren. (Vol. III, p. 1677.)

Pursuant to Mr. Schmulowitz' agreement that we might ask Mr. Lilly for these contracts, we got in touch with Mr. Lilly, who advised us that these contracts had never been in his possession. We so advised court and counsel. Mr. Parker was then put on the stand on rebuttal and testified that Mr. Milner, a representative of Mr. Lilly's office, had come to see him in connection with this matter, had examined and checked these documents, and on leaving had taken some documents with him. That that was the

last time Parker remembered seeing the contracts. (Vol. VI, p. 3311.)

The only witness called by us on surrebuttal was G. E. Milner, a public accountant associated with Pace, Gore & McLaren, who testified that at Mr. Lilly's direction he had gone to the office of Parker at Hyland's office, in the fall of 1930, to check certain documents, that *he was not requested to check these contracts, did not examine them, and did not take them with him.* (Vol. VI, p. 3379.)

We had already discovered that Colbert was on the payroll of Hyland in September, 1929. We had also discovered that there was further evidence of the dealings between appellant and Colbert, as evidenced by Journal Entry No. 897, which was introduced as Defendants' Exhibit JJ. (Vol. IV, p. 1729.) It will be noted that this is one place where appellant cannot claim to have no personal knowledge of his books, as it is the only entry which is personally signed by Richard C. Hyland. It shows that George P. Colbert, an employee of H. M. Newhall & Co., and the man appointed by appellant as his competent and disinterested appraiser, received commissions from Hyland for purchase of burlap from Newhall. These purchases, as indicated by the contract number, are the 350,000 yards actually received after the fire, and the 100,000 yards actually sold by Newhall in December, 1928, the contract being cancelled and a new invoice made at a lower price under date of June 20th, although the goods had been received and used prior to that time. In addition to receiving commissions on these sales, Colbert was given a portion of

the amount of the refund to Newhall, received as the result of the cancellation of this contract and purported resale at a lower price, which was put through in this journal entry as a credit for inferior burlap.

As a result of this discovery, Colbert was recalled. This witness testified that about November, after the fire, he had a conversation at Hyland's office. (Vol. IV, p. 1570.) Hyland asked him to prepare certain contracts, which could be cancelled, on which he could predicate the value at which goods could be replaced in making up his proof of loss. (Vol. IV, p. 1751.) He furnished Hyland with blanks to make up these contracts, and the contracts were made up but he did not get any copy of them. Hyland prepared a letter to H. M. Newhall & Co., handing him the original, which, as the contracts were null and void did not represent actual sales, he destroyed and never put in the file. These contracts were signed H. M. Newhall & Co., by Geo. P. Colbert, and were left with Mr. Hyland. (Vol. IV, p. 1752.) He had no authority to sign any contracts. On examination by Mr. Schmulowitz, he testified:

> "Within the last few weeks Mr. Hyland telephoned to me and asked me to revise the figures on these old contracts and I supplied him with new forms and the contracts were signed and they were automatically cancelled in my presence by Mr. Hyland. Yes, within the last few weeks. I could not say whether those copies of those contracts were the counterparts of these numbers, I never checked the contracts back, I never was given copies of the contracts, because I never

placed any value on the contracts, as of no consequence in connection with H. M. Newhall & Co." (Vol. IV, p. 1766.)

He also identified a copy of a letter dated October 22, 1929, and received in evidence as Plaintiff's Exhibit 119 (Vol. IV, p. 1771) as a copy of the letter addressed to H. M. Newhall & Co., attention Mr. Colbert, by Hyland. It will be noted that this letter asked Colbert to dispose of the merchandise represented under these "fictitious contracts", but expressed his desire to retain bona fide contracts which were held with Newhall. Appellant then also introduced in evidence letters from H. M. Newhall & Co., signed by Geo. A. Newhall, Jr., calling the attention of appellant to the fact that certain contracts with H. M. Newhall had not been signed and returned to them. (Plaintiff's Exhibit 120, Vol. IV, p. 1776, Plaintiff's Exhibit 121, Vol. IV, p. 1785.) On recross examination, however, it was stipulated that the numbers of the fictitious contracts did not appear in these two exhibits. Colbert also testifies:

"As to having stated that subsequently, within the last two or three weeks, *I had prepared other contracts for Mr. Hyland,* I don't know exactly the date, but it was *probably three or four weeks ago.* I think it was since the trial started, yes, I am quite sure it was. *This trial started October 13, yes, it was after that date.* Yes, I said they were also prepared by Mr. Hyland. Yes, I signed them 'H. M. Newhall & Co.' by myself. No, *they did not represent any actual sales of burlap. Yes, they were also fictitious contracts.*

The Court. These contracts mentioned in HH are fictitious contracts?

A. They were contracts, Judge, that were prepared, as I said in my testimony, to show prices only. That was what they were to be used for, prices at which——

Q. (interrupting). Still they were fictitious?

A. They were fictitious.

Q. Have you just testified that there were other contracts which were fictitious?

A. Yes.

Mr. Thornton. *They were prepared by Mr. Hyland and signed by you since the starting of the trial of this case?*

A. *Yes, I don't know the exact date, but it was since this trial started.*

* * * * * * *

The Court. Yes. Q. Are those contracts numbered, the contracts made since the trial commenced?

A. I don't know, your Honor, whether they were numbered or not, they were given for the same purposes as those were given; whether they had numbers on them I could not say positively." (Italics ours.) (Vol. IV, pp. 1800-1801.)

Mr. Almer Newhall was then called as a witness and was shown Plaintiff's Exhibit 122, which is identically the same as Defendants' Exhibit HH. He testified:

"A. There are no contracts shown on this page that are contracts to which H. M. Newhall & Co. is a party, and there were no such cancelled contracts. We made no such sales.

That is correct, in other words, H. M. Newhall & Co. made no contracts bearing the contract num-

bers, the dates of the contracts as they appear on this sheet. No, H. M. Newhall & Co. did not make any contracts with the Hyland Bag Company or Richard C. Hyland covering burlap of the description set forth on this sheet for shipment or for delivery on the date set forth in Plaintiff's Exhibit 122. No, there were not any contracts between H. M. Newhall & Co. and Hyland Bag Company cancelled after the fire of October 19, 1929. I have at your request examined my books to ascertain what the contracts bearing these numbers actually represent. I have brought the original contracts here in a suitcase and would like to have the suitcase." (Vol. IV, pp. 2079-2080.)

He produced a summary of the books of H. M. Newhall & Co. which was introduced as Defendants' Exhibit NN. (Vol. IV, p. 2081.) The gist of this report covering these fictitious contracts is as follows:

Newhall contract 1449 was actually dated August 22nd and covered a sale of 1000 bales of raw jute to the California State Prison at San Quentin. Contract 1541 was a sale of 25 cases of abalone to Sumatra. Contract 1542 was for the sale of 100 bales of California cotton to Japan. Contract 1578 was a sale to the Pacific Bag Company of 400,000 yards of burlap. Contract 1593 was for the sale of 36 bags of tapioca to Standard Grocery Co. Contract 1602 covered the sale of 25 bales of 40-10 burlap to the Pacific Bag Company. (Vol. IV, p. 2082.)

On cross-examination this witness produced the contract books. (Vol. IV, pp. 2130-31.) It appears that these records were numbered when they were printed

from 1 to 10,000. (Vol. IV, p. 2144.) There had been no changes or alterations in these sales registers and the contracts followed in their regular number. The register does not indicate any changes or erasures. (Vol. IV, pp. 2049-2050.)

AS TO OTHER FALSE SWEARING BY APPELLANT DURING THE COURSE OF THE TRIAL.

Appellant was recalled on rebuttal and categorically denied all testimony which had been given adverse to him. But to show the boldness of this witness, his absolute disregard for the truth and his readiness and willingness to commit perjury under any and all circumstances, we desire to call the court's attention to Exhibit 165 (shown in Volume 6, p. 3258), introduced while he was testifying on rebuttal. In the first place, this exhibit admits our contentions that 36-8 and 40-8 burlap were listed and priced as 36-9 and 40-10 burlap. He also made another admission for which we contended throughout the trial, namely, that 42,880 pounds of burlap bale covers included in his claim as lot No. 403, of a value of $2572, were really only 8880 pounds. (This is another over-statement of $2039.20, according to his own admission, although we have not taken the time of the court to discuss this item.) In this exhibit, which, by the way, is in the form of a letter addressed by appellant to his atorney, under date of January 2, 1932, he first sets up his proof of loss figures and shows the result, after claiming to have made a correction for the improper classi-

fication of burlap and the improper weight of burlap bale covers. He then sets up a figure purporting to show his loss based on Logie's prices, also showing a correction for the erroneous prices. He then sets up a figure purporting to be based on New York prices, concerning which we had introduced evidence, and makes the correction. He then sets up another figure supposedly based on New York prices, plus freight to San Francisco. He then sets up a figure supposedly based on Bemis prices. He then testifies that he has refigured these items on the basis of the values as testified to by these parties and that his loss is represented by this exhibit. *To say that the temerity of this witness in producing this exhibit is astounding is to express it mildly.* This is particularly true in view of the length of this trial and what we considered a rather thorough cross-examination of the various witnesses. On cross-examination, Mr. Hyland could not remember any of the figures upon which he based his Exhibit No. 165. He could not explain how there was a difference of only $2821 supposedly based on New York prices and the figures in the proof of loss, although there was a differential from 2¢ to 4¢ a yard covering several hundred thousand yards of burlap. (Vol. VI, p. 3294.) Although he had been in court when Taylor testified that their proof of loss claimed $30 a thousand more than the actual selling price for A.B.S. bags, he had given no effect to this in his exhibit because he stated that our witnesses did not testify as to bags. (Vol. VI, p. 3295.) He stated:

> "I have not attempted to check this statement up, Mr. Thornton. No, I did not think it neces-

> sary to bring my work sheets to check this. As for knowing I would be cross-examined in regard to them, *I did not anticipate a cross-examination of this length.* (Mr. Thornton. Q. I do not think you did.) Or I would have brought them." (Italics ours.) (Vol. VI, p. 3296.)

He then made a very interesting admission for a man who has been constantly trying to hide behind his bookkeeper and his adjuster.

> "I certainly was in court when Mr. Griffits testified. * * * I heard Mr. Griffits testify as to prices and *I am just as well qualified as Mr. Griffits. As for my knowing prices and being qualified: I know the burlap market, and I know what Mr. Griffits' organization always did, and what they have been doing for twenty-five years."* (Italics ours.) (Vol. VI, pp. 3296-3297.)

And yet this man has always expressed ignorance of values and could not give any values even during this cross-examination. In the afternoon he brought his work sheets which were introduced as Defendants' Exhibit EE. (Vol. VI, pp. 3303 to 3310.) We shall not unnecessarily prolong this brief by quoting this cross-examination in full, although it more clearly than any other part of the record shows the character of this man. The sheets on which he did the actual figuring he had thrown away, according to his testimony. He then wants to explain a "little misstatement" that he had made in his direct examination, as he stated "unintentionally". Although he had testified that he had figured the various items in the proof

of loss and had arrived at a total of $83,514.54 as per Logie, as a matter of fact he merely picked out certain items and applied what he considered to be Logie's figures, using the proof of loss figures for the balance of the inventory, having Taylor check on three particular items, 36-8 burlap, 40-8 burlap and bale covers. This, of course, was patent on the face of Exhibit 165. As a matter of fact, the only items figured on Logie's prices out of the total of $86,807.98 consisted of ten items involving only $12,461.81. This same thing appears true as to the so-called New York prices and the so-called Bemis prices. Is it any wonder that in his opinion, the court states:

> "The evidence in this case shows that the overvaluation resulted from no such inadvertence but from an intentionally fraudulent attempt to get an excessive award from the insurance companies." (Vol. I, p. 180.)
>
> "Plaintiff attempts to avoid responsibility for any overvaluation on the ground that proofs of loss and the foundations for the claims sued for in this action were prepared by his bookkeeper and accountants hired by him and that he merely signed what was presented to him. I believe the evidence shows that such was not the fact—*that plaintiff knew what was in his factory, and that his claim of loss was overvalued.*" (Italics ours.) (Vol. I, p. 181.)

Is it any wonder that the court, even though reluctantly, finds that plaintiff was guilty of fraud and false swearing? Is it any wonder that, upon motion for new trial based partially on the ground that the

court had not found that this fraud and false swearing was intentional, the court states:

> "In order to avoid any possible misunderstanding, I find that plaintiff was guilty of wilful and intentional fraud and false swearing in making his proofs of loss." (Vol. I, p. 233.)

Truly, the preparation of this Exhibit No. 165 was just as bold and just as amateurish as the attempted burning of this plant.

AS TO THE AUCTION SALE.

Evidence was introduced at the trial, over our objection, relative to an auction sale held on April 22, 1930, and relative to the amount received. The trustee of that sale was W. H. Metson, who appears as of counsel for appellant. The auctioneer was Ben Sugarman, the adjuster for Hyland. By appellant's own admissions, the difference in the value of any burlap between October 19, 1929, and the date of the auction sale, April 22, 1930, was on the later date 16% lower. The court will recognize that the amount realized at a forced sale, or at an auction sale, is no criterion of value. This is particularly true on a falling market where there has admittedly been a decline of 16% in values in a period of six months. Had we attempted to prove the values in the Hyland plant as of the date of the fire by taking the figures realized at this auction sale, on each of the types of material, counsel would have promptly, vigorously and properly objected. Nevertheless, appellant attempts to prove damage to goods

taken from these premises by showing that a certain amount was realized at an auction sale.

Conducted as this sale was, it still shows that there was a remarkably small amount of damage to these goods. According to Mr. Smith's figures, Exhibit UUU, (Vol. V, p. 2723) the actual value of these goods amounted to $66,626.05. He further states, as we have already pointed out, that this value is high as he did not have the correct unit values which were later proved through Logie and Griffits. But, even accepting his figures, we find that applying appellant's 16% drop in value, these goods were worth on the day of the auction only $55,965.82. Even at that they were sold for approximately $38,000. From this appellant deducted auctioneer's fees and other expenses and endeavored to persuade the trial court that these fees and expenses were a portion of the damage suffered by reason of this fire.

An interesting thing in this connection, and one which may account for the fact that this burlap did not bring an even higher price, is that we find that when this merchandise was first moved from Sacramento Street to the Green Street warehouse, the damaged merchandise was segregated from the undamaged.

Sugarman, Hyland's adjuster, and later his auctioneer, mingled these goods. Radford testifies:

> "Mr. Sugarman didn't tell me to move some of the damaged material in with the good material, indicating that it might serve to bring a larger price at an auction sale, *he just moved it in there.*

He moved it in and he told me that was his reason." (Italics ours.) (Vol. V, p. 2581.)

"'Well, I had received instructions from Mr. Smith of just how he wanted that merchandise placed in the building, that he wanted, as I explained, the good and bad separated. I noticed when I went down there in the morning, I don't know how to state this, but I mean I returned there one morning and found that various flats of the damaged sacks and sugar liners had been moved over among the good merchandise; in other words, apparently good piles of sacks had been taken out of their place and the damaged merchandise sprinkled amongst it, that is, the flats.

Q. Did you ascertain who did that, or under whose directions it was done?

A. Yes, I did. *Ben Sugarman said that he had made the change in the merchandise,* that he had placed the damaged among the good for this reason, that he said in his experience conducting salvage sales, that if he sprinkled in a little bad with the good, that the psychology of it was, he thought, that it would bring more money'." (Italics ours.) (Vol. V, pp. 2602-3.)

Smith testifies:

"Q. Do you know whether there was such a segregation at the Baker-Bauer Warehouse?

A. Yes. My orders were partially carried out. They had it lined out the way I wanted it at one time, and then Ben Sugarman re-arranged it; he put some of the fire-damaged stuff in with the other merchandise.

Yes, I did have a conversation with him relative to that. I told him it was our understanding that it was to be segregated. He gave me his reason.

He said he thought it would be better in case they wanted to sell it, it would bring more money if you made it look like damaged merchandise.'' (Italics ours.) (Vol. V, p. 2704.)

Yes, Mr. Hyland and I did have a discussion upon the subject of Mr. Hyland's disposition of the salvaged merchandise. Mr. Hyland told me that he thought that he could sell that stuff, and get $40,000, $45,000, or maybe $50,000 for it on a five per cent commission and *I told him,* as I had told him on all other occasions, *I had nothing to do with it, it was not my merchandise,* he could sell it for $40,000 or $50,000, of course if he did not have use for it he could go ahead and sell it; *I also told him that did not have anything to do with the amount of loss, what he sold it for, because I said, 'If you want to sell good merchandise at a sacrifice, that is a matter for your own consideration and not a matter of the insurance companies' protection,'* and the most of the merchandise, I will say 75 or 80 per cent of the merchandise which was comprised in the inventory could have been run through the factory in the regular course, that is, Hyland would not have had any loss on that portion, and there was no reason why it should be sold at a sacrifice. * * *'' (Italics ours.) (Vol. V, p. 2808.)

Smith was also informed by buyers at this sale that the grades of merchandise were wrong. (Vol. V, p. 2837.)

On cross-examination Sugarman admitted another reason:

''At the time of the sale I believe there were new lot numbers used, not the Radford lot num-

> bers. The tags bearing the Radford numbers had not been removed. I am positive of that. The list as supplied to some of the bidders was by Radford number; originally we showed them copies of the Radford inventory, showed them to the bidders, but we sold on a different basis." (Vol. II, p. 1019.)

We then showed him a list which was received in evidence as Defendants' Exhibit Q (Vol. II, p. 1021), showing that all of the Radford lot numbers had been changed at the auction sale.

This court will probably wonder why an auction sale was held. The answer may point directly to the reason for the fire and the type of fire that we found occurring on October 19, 1929, at the plant of the Hyland Bag Company. Within two or three days after the fire Sugarman told Smith that Hyland wanted to get out of the bag business, that Sugarman had fixed up a merger. (Vol. V, p. 2687.) Hyland said the same thing. (Vol. V, p. 2857.) We find that as a matter of fact, before this auction sale Hyland had sold to Pacific Bag Company his entire business of manufacturing domestic bags, and that Hyland himself, prior to this auction, had been employed as General Manager of Pacific Bag Company. (Vol. I, p. 520.) We have also shown that the machinery of the Hyland Bag Company was sold to Pacific Bag Company and removed to their plant. (Vol. IV, p. 2075.) As we have already pointed out, the court visited the premises of the Pacific Bag Company on Monday, January 18, 1932, and saw this machinery. (Vol. VI, p. 3379.)

The mere fact that this appellant, long after his claim against these insurance companies had matured, and after a drop in the market of 15%, elected to sell merchandise 75 to 80% of which was absolutely undamaged, and for which he had no further use due to the sale of his manufacturing business, cannot be considered as proving, or tending to prove the damage sustained to this material by reason of the fire.

AS TO THE POLICY OF INSURANCE OF THIS APPELLEE.

Prior to August 1st the Hyland Bag Company was carrying the $50,000 of underlying or primary insurance involved in this litigation. On August 1st an additional $50,000 was procured from this appellee. In and by that policy it was provided

> "The amount of insurance under this policy is provisional and attaches at all times in excess of $50,000." (Vol. I, p. 343.)

In other words, it was agreed that when the value of the stock exceeded $50,000, this policy would immediately attach, subject, however, to other qualifying conditions of the contract. As to the meaning of the word "provisional," we find in the form a definition of that term as used in the contract. (Vol. I, p. 345.) It is stated that it is for the purpose of defining the premium, that if the actual premium should be more than the deposit, the insured would be required to pay the difference, if less, the company must refund the difference. In other words, appellant was to pay only for the portion of the policy that was actually used. It is further provided:

> "It is understood and agreed that this insurance shall attach *only* to the extent of the difference between the amount of all other specific insurance upon the property described herein and 90% of the actual cash value thereof; and the amount so arrived at shall be the basis of contribution with all other insurance in the event of loss, but in no event shall the liability of this company exceed the amount for which this policy is written." (Vol. I, p. 344.)

In other words, it was specifically agreed by and between appellant and this appellee that while this policy of insurance was to attach immediately upon the value of the stock exceeding $50,000, it was to attach only to the extent of the difference between the amount of all other specific insurance and 90% of the actual cash value.

If, for the sake of argument, we consider that the actual cash value was $130,000, 90% of that value would be $118,800. In addition to this excess policy of this appellee there was $135,000 of specific insurance. We therefore find that there could have been no "difference between the amount of all other specific insurance upon the property described herein and 90% of the actual cash value thereof." In other words, there could be no difference as against which the policy of this appellee could apply and there would be no basis for contribution as provided in the policy.

If, on the other hand, the actual value of the stock was as is set forth in Exhibit UUU, $66,626.05, 90% would be less than $60,000. It would, of course, be farcical to contend that, if there was only that amount

of loss with $135,000 of specific insurance, any liability or any contribution of this appellee is involved in this case.

It is further provided in the policy,

> "If in the event of loss claim does not exceed $50,000, it is understood and agreed that there shall be no insurance effective hereunder." (Vol. I, p. 344.)

If we have convinced this court, and we do not see how we could have failed so to do, that the actual loss sustained by appellant was less than $50,000, this provision of the policy absolutely eliminates this appellee, and the judgment in its favor should be sustained regardless of any other defense which it may have interposed. It will probably be contended that the proof of loss submitted by appellant is in excess of $73,000. By no stretch of the imagination can it be held that, because an insured deliberately exaggerates the amount of loss he sustains, a company which has in its policy a provision such as was last quoted can be forced to contribute.

Attorneys for appellant called as a witness one Wallace B. McLaren, an insurance broker who at the time of the issuance of this policy, was one of the general agents for this appellee. This party was not called as an adverse witness, but we also objected to his testimony under the decisions of this court, which were called to the attention of the trial court, namely,

Fidelity Union Fire Ins. Co. v. Kelleher, 13 F. (2d) 745;

Northwestern National v. McFarlane, 50 F. (2d) 539.

Nevertheless, the attorney for appellant insisted upon bringing out the intention of the parties relative to this policy.

McLaren testified:

> "There is a policy condition in this form that any underwriter having any experience whatsoever would say it constituted a joker. Under my policy I received the same rate that other companies had, and yet, under their policy, if there was a loss of $10,000 or 10 cents they had to pay a proportion of that loss and *yet under my policy, receiving the same rate that they received, the loss had to exceed $50,000.* I felt at the time that with such a joker like that I should not have charged as much as I did, and I was looking out for the interest of my company. Therefore, to me, they received something in the form of a contract that was a most acceptable contract." (Italics ours). (Vol. II, p. 1086.)

It will be noted that on the 11th day of January, 1930, this appellee, by and through its adjuster, after having received on December 26, 1929, the proofs of loss, disclaimed any liability whatsoever under this policy of insurance. (Exhibit 60, Vol. I, p. 409.)

AS TO THE LAW OF THE CASE.

AS TO CONSTRUCTION OF POLICIES OF INSURANCE.

The well settled rule of the Federal Courts is that the terms of the policy are the measure of the liability of the insurer, and that to recover the insured must prove that he is within those terms. The court will not

consider the reasons for the conditions or provisions of the policy. It is enough that the parties have made certain terms and conditions. The courts may not make a contract for the parties but simply enforce the one actually made.

Imperial v. Coos County, 141 U. S. 452;
Fidelity Union Fire Ins. v. Kelleher, 13 F. (2d) 745 (C. C. A. 9).

It is equally well settled that the terms of the contract may not be established or altered by parol evidence, nor can the court take a shortcut to reformation by striking out a clause of the contract.

Northwestern National Ins. Co. v. McFarlane, 50 F. (2d) 539 (C. C. A. 9);
Fidelity Union Fire Ins. v. Kelleher, supra.

AS TO EXCESS INSURANCE.

This court has uniformly upheld contracts of insurance in the form agreed to by the parties. Excess insurance is equally well known and provisions to the effect that the policy would not take effect except as to that portion of the loss exceeding the amount specified in the policy, and that the insurer was not liable where the loss proved was less than the amount specified, have been sustained.

Guttner v. Switzerland Gen. Ins. Co., 32 F. (2d) 700.

AS TO THE MEASURE OF RECOVERY.

The insurance companies, of course, are not liable in any amount unless damage has actually been sustained to the property by reason of fire. This is well recognized by the Federal Courts.

North River Ins. Co. v. Clark, 80 F. (2d) 202 (C. C. A. 9).

In and by the policies of insurance issued to appellant, it was and is provided:

> "The company will not be liable beyond the actual cash value of the interest of the insured in the property at the time of loss or damage nor exceeding what it would then cost the insured to repair or replace the same with material of like kind and quality." (Vol. I, p. 342.)

While this subject has been considered many times, a recent decision of the United States Supreme Court is interesting. In this case the railroad company delivered coal at Minneapolis, and there was a shortage in the delivery. Such coal could be purchased and delivered at Minneapolis at $5.50 a ton, plus freight, whereas the market price in Minneapolis for like coal sold at retail was $13.00 per ton. In the first trial the District Court gave judgment for the wholesale value of $5.50. This judgment was reversed by the Circuit Court of Appeals and upon retrial the District Court gave judgment for the retail value, which was affirmed by the Circuit Court of Appeals. The Supreme Court of the United States reversed this decision and stated:

> "The test of the market value is at best but a convenient means of getting at the loss suffered.

It may be discarded and other more accurate means resorted to if, for special reason, it is not exact or otherwise not applicable."

Ill. Central R. R. v. Crale, 281 U. S. 57.

AS TO FRAUD AND FALSE SWEARING.

The policies of insurance involved in this action are the Standard Form required by the laws of California, and were adopted in 1909. (General Laws 1909, p. 509.) The provisions of the policy are those adopted by the legislature of this state, are mandatory and are binding on both the assured and the insurer. The policy provides:

"Matters Avoiding Policy. This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or, (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

As a further expression of its intentions and the meaning of this provision, the legislature adopted Section 549 of the Penal Code, which reads as follows:

"Sec. 549. Preparing, etc., false proof of loss. Every person who presents or causes to be presented any false or fraudulent claim or any proof in support of any such claim, upon any contract or policy of insurance or indemnity whatsoever for the payment of any loss, or who prepares, makes or subscribes any account, certificate of survey, affidavit or proof of loss, or other book,

paper, or writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable by imprisonment in the state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

In a case passed on by the Supreme Court of the United States, it appeared that the insured appeared for examination under oath, and made certain statements relative to the acquisition of the property involved. It is stated that there was evidence tending to show that his answers were made not with the purpose of deceiving and defrauding the insurance companies, but in order that he might be consistent with a statement theretofore made to R. G. Dun & Co.

" * * * And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured. A false answer as to any matter of fact, material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and wilfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts. No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false and wilfully made, the fact that they are material is proof of an attempted fraud, because their ma-

teriality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed. 'Fraud,' said Mr. Justice Catron, in Lord v. Goddard, 13 How., 198, 'means an intention to deceive.' 'Where one,' said Shepley, Ch. J., in Hammatt v. Emerson, 27 Me. 308-326, 'has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive.' 'If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law.' Bosanquet, J., in Foster v. Charles, 7 Bing., 105; Polhill v. Walter, 3 B. & Ad., 114; Sleeper v. Ins. Co., 56 N. H., 401; Leach v. Ins. Co., 58 N. H., 245.

* * * * * * *

The fact whether Murphy had an insurable interest in the merchandise covered by the policy was directly in issue between the parties. By the terms of the contract, he was bound to answer truly every question put to him that was relevant to that inquiry. His answer to every question pertinent to that point was material, and made so by the contract, and because it was material as evidence; so that every false statement on that subject, knowingly made, was intended to deceive and was fraudulent.

And it does not detract from this conclusion to suppose that the purpose of Murphy in making these false statements was not to deceive and defraud the Companies, as is stated in the bill of exceptions and certificate, but for the purpose of preventing an exposure of the false statement previously made to the commercial agency in order to enhance his credit. The meaning of that we

take to be simply this: that his motive for repeating the false statements to the Insurance Companies was to protect his own reputation for veracity, and that he would not have made them but for that cause. But what is that, but that he was induced to make statements, known to be false, intended to deceive the Insurance Companies, lest they might discover, and others through them, the falsity of his previous statements; in other words, that he attempted, by means of a fraud upon the Companies, to protect his reputation and credit? In any view, there was a fraud attempted upon the insurers; and it is not lessened because the motive that induced it was something in addition to the possible injury to them that it might work. The supposition proceeds upon the very ground of the false statement of a material matter, knowingly and wilfully made, with the intent to deceive the defendants in error; and it is no palliation of the fraud that Murphy did not mean thereby to prejudice them, but merely to promote his own personal interest in a matter not involved in the contract with them. By that contract, the Companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, wilfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance."

Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 95, 97 (28 L. Ed. 82).

In a case where the insured claimed a total loss to insurance of $30,000, claiming a valuation of the property destroyed of approximately $36,000, and the jury returned a verdict of $17,000, the Appellate Court reversed the judgment of the lower court, holding that this disparity of nearly $19,000 shows on its face that, as a matter of law, the proof of loss was fraudulent. It also holds that where claim was made for approximately $2500 on goods in process, and the evidence shows that as a matter of fact that sum was the contract price the company was to receive for manufacturing goods for others, that there could be no other conclusion than that the statement in the proof of loss was knowingly made for the purpose of getting money from the insurance company that plaintiff was not entitled to, and was fraudulent as a matter of law. In that case the proof of loss was signed and sworn to by the President of the plaintiff corporation.

United Firemen's Ins. Co. v. Jose Rivera Soler & Co., 81 F. (2d) 385.

In another case it was held that where the amount of loss was overstated by some $16,000 or, to express it another way, it was claimed that approximately 5,000 pairs of shoes in excess of what the books of the insured showed could have been in the store, the trial court properly granted a directed verdict. The Appellate Court said:

> "The claim made in the proof of loss *and in the evidence at the trial* is not only false, but so grossly excessive as to value that no other con-

clusion could be drawn than that it was knowingly and fraudulently made." (Italics ours.)

Cuetara Hermanos v. Royal Exchange Assur. Co., 23 Fed. 270, 272. (Certiorari denied. 277 U. S. 590 (72 L. Ed. 1002).)

In another case where the evidence showed the goods were soaked with kerosene but only a very small portion of the goods were completely destroyed, that the insured swore to a value in excess of $43,000 and a loss in excess of $35,000, that an expert appraiser of the Underwriters' Salvage Company estimated the sound value at a little over $22,600, and the total damage at a little less than $12,700, and that the appraiser fixed the sound value of the goods at a little over $26,000 and the damage at a little less than $14,000, the court held:

"The oath as to values in the proofs of loss was not a mere matter of opinion. It was a sworn estimate of value by one having special knowledge of the property made, with the intent that the other party, ignorant on the subject, and with unequal means of information, should rely upon it to his injury. It appeared that this estimate of value was grossly excessive, and *the circumstances surrounding the fire were such as to warrant the conclusion that it was willfully false and fraudulent.*" (Italics ours.)

The court also holds that denial of liability does not waive the breach of conditions relative to false swearing.

Orenstein v. Star Ins. Co., 10 F. (2d) 754.

Where the insured filed proofs of loss claiming that the value of the property destroyed exceeded $12,000, although he had bought it with other property, for $10,000, and none of his witnesses testified to a value exceeding $8,000, the court held that the question of false swearing should have been submitted to the jury.

> "The policy is avoided not only for fraud, but also for false swearing by the insured touching any matter relating to the insurance or the subject thereof, 'whether before or after a loss'. If the condition were against fraud alone, the argument as to reliance by the company might be pertinent; but the condition against false swearing is broken when a false oath is knowingly and willfully made by the insured as to any matter material to the insurance or the subject thereof. It is said in some of the cases that same must be made with intent to deceive or defraud * * * But, as pointed out by the Supreme Court of the United States in Claflin v. Ins. Co., 110 U. S. 81, 95, 97, 3 S. Ct. 507, 515, 28 L. Ed. 76, the intent to deceive and defraud is necessarily implied in the intentional and willful making of a false statement as to a material matter."
>
> *Globe & Rutgers Fire Ins. Co. v. Stallard,* 68 F. (2d) 237, 240.

The court also holds that it is no defense to false swearing that further proofs of loss have been waived by the conduct of the adjuster.

In a case where the Chief of the Fire Department testified that there were four separate fires on three separate floors, and cloth saturated with kerosene was found in different parts of the building, the proof of

loss claimed a value of $24,000 and a damage of $22,000, the jury returning a verdict of $5,000, the court held that the finding of the jury was against the weight of the evidence and reversed the judgment.

Domalgalski v. Springfield, 218 N. Y. S. 164.

Here it appears that two months preceding the fire, insurance on the stock was increased from $30,000 to $180,000, that coverage on fixtures was also increased and that only a month before the fire the corporation took out insurance against loss of profits, that the insured claimed to have had stock on hand in an amount much greater than the merchandise inventory showed, and bills were introduced to show that insured had purchased a large quantity of merchandise and it further appeared that many of these bills were altered and the amounts thereof changed, the court says:

> "Where the evidence is clear and convincing as to the perpetration of the fraud, and there is really no countervailing proof, the court is not to stultify itself by holding that there was any real issue in this case, which requires submission to another jury. Any verdict in favor of plaintiff, in view of the evidence presented in this record, would rightfully be set aside by the Trial Court."
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> *Demarest v. Westchester Fire Ins. Co.,* 255 N. Y. S. 325, 329.

In a case in Wisconsin the defendant insurance company admitted the policy and the fire but denied that the value of the property was as alleged in the proofs of loss. Evidence was introduced to show that plaintiff made fraudulent entries in his books of account setting up as its original inventory a great

amount of merchandise which did not in fact exist. The policy contained a provision to the effect that any fraud or false swearing by the assured should render the policy void. The fire was a "flash fire" and had the appearance of having been fed by some inflammable liquid. The jury returned a special verdict holding that the plaintiff did not knowingly and falsely represent the amount of the loss to be substantially in excess of the true amount. On appeal the judgment for plaintiff was reversed with directions to change the answer to the special verdict and enter judgment in favor of the defendant, dismissing the action. The court states there was evidence which would warrant a jury in determining the fire was of incendiary origin and which tended to show respondent's profits were not as represented and the claim of damages was excessive. The court held that applying the percentage of profits shown in the income tax return, or during the last few months of the business, would reduce to a marked degree the amount of goods on hand. It also stated that a fire burning evenly and the result of a flash, never developing sufficient heat to destroy any part of the structure in which the fire occurred, and leaving a large amount of goods easily identifiable could not in the nature of things consume a large amount of merchandise in the same room with paper labels, and other like material, without some evidence of the burning. The conclusion, therefore, must be that the goods were not in the building at the time of the fire, and that the respondent knew this and that its proofs of loss were made out with the intention of inducing the insurer to act to its disadvantage. It

held that if the insured knowingly and willfully, and with intent to defraud the insurer, swore falsely in making proof of loss, such act amounted to a fraud upon the insurer.

Liberty Tea Co. v. LaSalle Ins. Co., 238 N. W. 399.

It is also held that false swearing by an agent authorized to make proofs of loss will defeat the rights of the insured under the policy, even though the insured be innocent.

American Eagle Fire v. Vaughan, 35 F. (2d) 147.

In another case the insured's proof of loss set forth a claim showing damages of $73,000. The jury found the loss to be $33,000, and also found that the insured did not falsely state the amount of the loss with intent to defraud the insurer. The court held that these findings were not capable of being reconciled and reversed the judgment. It stated:

> "Under the Wisconsin Standard fire insurance policy, the insured, if he suffers a loss, must honestly state, under oath, the extent of his loss, and give this information to the insurer. He must not make false proofs of loss with intent to defraud the insurer. Although the penalty is heavy and seemingly harsh, it is one way of stopping the presentation of false, fictitious or inflated claims. False and exaggerated claims seemingly go hand in hand with incendiarism. The court should therefore unhesitatingly act to prevent attempted frauds on the part of the insured."

American Home Fire Assur. Co. v. Juneau Store Co., 78 F. (2d) 1001.

AS TO ALLEGED ERRORS PREDICATED UPON THE ADMISSION OF EVIDENCE.

The major portion of the errors assigned in the bill of exceptions consist of the admission of evidence over objection by the appellant. The rule has been well expressed by this court in an opinion by Judge Sawtelle.

> " 'since the rulings of the lower court upon the admissibility of evidence in an equity suit are in no way binding upon us and if wrong do not constitute reversible error * * * it is unnecessary to discuss the assignments of error based upon them.' Johnson v. Umsted (C. C. A. 8) 64 F. (2d) 316, 318; Unkle v. Wills (C. C. A. 8) 281 F. 29, 34."
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> *Strangio v. Consolidated Indemnity & Ins. Co.,* 66 F. (2d) 330, 336.

To the same effect see

Johnson v. Umsted, 64 F. (2d) 316.

AS TO ERRORS RELIED UPON BY APPELLANT.

AS TO THE FIRST ERROR RELIED UPON.

The first error relied upon is that

> "The trial court erred in denying plaintiff's motion for special findings."

Yet appellant admits that the court did make findings, for in subdivision (d) of its first ground of error, it is stated that

> "Many of the findings made by the trial court were not within or not responsive to the issues, or

were upon merely evidentiary matters." (Appellant's Brief, p. 16.)

"Subdivision (c) under the first specification of error is that the court failed to find upon the principal issue of this case. The principal issue in this case arose upon the answer of defendants upon false swearing." (Appellant's Brief, p. 14.)

Yet the court found

"That plaintiff was guilty of fraud and false swearing in connection with his proofs of loss, and the pleadings and testimony in this case, and that his conduct has barred his right of recovery herein * * * The evidence on the phases which I have discussed, being clear and convincing bars plaintiff's right to recover and makes it unnecessary to discuss or find upon the other issues. In view of the discussion of the facts and the law in this opinion, I adopt it as my findings of fact and conclusions of law, and the motions of the respective parties for special findings is denied and exceptions noted." (Vol. I, p. 203.)

The court also holds:

"The evidence in this case shows that the overvaluation resulted from no such inadvertence, but from an intentionally fraudulent attempt to get an excessive award from the insurance companies." (Vol. I, p. 180.)

As we have already pointed out, the court, in denying petition for rehearing, further held:

"In order to avoid any possible misunderstanding, I find that plaintiff was guilty of willful and intentional fraud and false swearing in making his proofs of loss." (Vol. I, p. 233.)

The court thus adopted its written opinion as its finding of fact and conclusions of law. This is a recognized practice. The defenses to the action were fraud and false swearing in connection with the sworn proofs of loss, and also in connection with the complaints filed in the Superior and Federal Courts. There were also denials of the amount of loss claimed by appellant. It clearly appears that the court has found definitely on these defenses. It has found that there was wilful and deliberate fraud and false swearing violating the contracts entered into between appellant and appellees. As the result of such findings, the court, as a conclusion of law, has decided that appellant was not entitled to recover and that defendants were entitled to a decree with costs.

In addition the court has found that the fire was incendiary, and that this was known to appellant. It is also found that there was an over-statement of the amount of loss, which was wilfull and intentional. It is also found "that there was little or no merchandise burned out of sight". (Vol. I, p. 187.) In this connection the court has found that it was not necessary to ascertain the amount of the property, if any, which was burned out of sight as its decision as to fraud and false swearing was determinative of the issue.

In connection with the question of fraud and false swearing the court has also found relative to fraud and false swearing in the testimony at the trial. Naturally, appellees could not anticipate the evidence which would be introduced by appellant and could not set up anticipatory defenses. However, under the

authorities cited under the heading "Fraud and False Swearing" in this brief, we have pointed out that this provision of the policy is also applicable to testimony given at the trial. The court has found specifically relative to this fraud and false swearing, and has enumerated the various instances in which it has occurred, among others relative to the pricing of the inventories introduced by appellant, relative to testimony as to the contents of the building, relative to increasing grading of the goods and relative to changes in records and preparation of fictitious contracts. It is true that in making these findings, the court has stated portions of the evidence introduced which led him to form his conclusions. The careful and able opinion of the trial judge is certainly of very much greater assistance to this court in arriving at a correct determination than would have been set, stereotyped findings to the effect that the allegations of the complaint were untrue, and the allegations of the answer were true, resulting in a conclusion of law that appellees were entitled to a decree. This opinion shows careful study and a thorough understanding of the case. As a matter of fact, it is, in our opinion, remarkable that any trial court sitting through such a lengthy trial could have waded through the mass of testimony and exhibits to arrive at such a clear, concise statement of the most vital issues which had been proved. The trial judge not only had the opportunity to examine the exhibits during the testimony, but he also listened to and observed the various witnesses who were produced by both sides. He is frank in stating that he believed some witnesses and did not believe others.

The trial court had the opportunity of observing the manner of testifying and the apparent evasiveness of many of the witnesses. His observations, of course, cannot be duplicated by this court by either reading that testimony as reduced to cold print, or by reading the briefs of the attorneys for the parties. We believe that the findings of the trial court as set forth in the opinion constitute a compliance with Equity Rule 70½. However, if this Honorable Court finds that the findings, as set forth in that opinion, do not comply with this rule, or that they are inadequate and should be amplified, the rule is very well stated as follows:

> "* * * On an equity appeal where no findings of fact or insufficient findings are made in the court of first instance, the appellate tribunal has power either to send the case back for further disposition or to make findings itself and decree accordingly. Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 179, 20 S. Ct. 336, 44 L. Ed. 417. Inasmuch as both parties had full opportunity to present all their material evidence on this issue and did present proofs sufficient for a finding, we choose to resolve the issue here."
>
> *Horwitz v. N. Y. Life,* 80 F. (2d) 295, 302.

> "An appeal in an equity suit invokes a new hearing and decision of the case upon its merits upon the lawful evidence. * * * The reviewing court will, if possible, dispose finally of an equity suit upon the record on appeal and not remand it for further trial in the District Court."
>
> *Johnson v. Umstead,* 64 F. (2d) 316, 318.

This court has had occasion to consider Equity Rule 70½ in a case cited by the trial judge, and upon

which he relied. That opinion was written by Judge Wilbur.

> "The rule is well settled, in states where findings are required by law, that it is not necessary to make findings on all defenses wherein findings actually made require a judgment in favor of either party. We do not believe that the Supreme Court intended to extend this rule by Equity Rule No. 70½ so that in every case there must be specific findings upon every issue, regardless of the fact that findings actually made sustain a decree, nor do we believe that it was the intention of the Supreme Court to introduce into equity and admiralty practice the difficulties inherent in the preparation of precise findings upon every material issue involved in the litigation. The rule is evidently intended to advise the courts on appeal of the decision of the trial court as to the material issues. It is obvious that, where the judgment of the trial judge, in determining the controverted issue of fact, is given great weight upon the appeal, in case of conflicting evidence by witnesses who testify in the presence of the judge, the appellate court in exercising its jurisdiction in equity and admiralty cases should be advised of the conclusion of the trial court as to where the truth lies as between witnesses who contradict each other. It may be conceded that in this case and all infringement cases it is a decided advantage to have the views of the trial judge upon the entire question, and particularly in cases of noninfringement the ground upon which the trial court finds noninfringement. The rule does not require this to be done. * * * In these cases the district judge filed an opinion and adopted the

same as his findings of fact and conclusions of law. We see no objection to this course. Until the opinion is adopted by the court as its findings of fact and conclusions of law, it is not a part of the record."

Parker v. St. Sure, 53 F. (2d) 706, 708-709.

This court also passed on the same question in a later case in which appellant also contended that the trial court had made numerous errors in its memorandum opinion. The court states:

"While Equity Rule 70½ requires that 'the court of first instance shall find the facts specially and state separately its conclusions of law thereon', and a literal compliance therewith would be attended with undoubted advantages to an appellate court and facilitate the presentation and consideration of appeals, we think the mere fact that the findings and conclusions—if sufficiently specific and otherwise in compliance with the rule—are set forth in the court's written opinion and adopted by the court as such findings and conclusions, is not such a violation of the rule as calls for a reversal of the decree."

National Reserve Ins. Co. v. Scudder, 71 F. (2d) 884, 888.

In addition, the rule is well settled that in equity actions the judge's findings, supported by substantial evidence, cannot be disturbed on appeal. This court has so held:

"It would serve no useful purpose to set forth the conflicting testimony relating to payment of the mortgage, because after an examination of

the record, we feel bound by the well settled rule that the findings of the chancellor, based on conflicting evidence, are presumptively correct and will not be set aside unless a serious mistake of fact appears."

National Reserve Ins. Co. v. Scudder, p. 887, supra;

McCullough v. Penn Mutual Life Ins. Co., 62 F. (2d) 831.

"As was said by Judge Rudkin, in the case of Easton v. Grant (C. C. A.), 19 F. (2d) 857, 859, 'the appellant is confronted by two well-established principles of law, from which there is little or no dissent: First, the findings of the chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact.' The second principle above referred to has no application here. See, also, Jones v. Jones (C. C. A. 9), 35 F. (2d) 943, and United States v. McGowan (C. C. A. 9), 62 F. (2d) 955, 957."

Collins v. Finley, 65 F. (2d) 625, 626.

"It is true that in an equity case the evidence is reviewed by this court, but it is a fundamental rule that, where the witnesses testify in person before the trial judge he is in a better position to pass upon the credibility of a witness than this court, and we will follow the decision of the trial judge unless it is clearly apparent that his decision is erroneous. Savage v. Shields (C. C. A.), 293 F. 863; Easton v. Brant (C. C. A.), 19 F. (2d) 857; Jones v. Jones (C. C. A.), 35 F. (2d) 943. The court rejected the testimony of

> a large number of witnesses adduced by the government as not worthy of full credit."
>
> *United States v. McGowan,* 62 F. (2d) 955, 957 (C. C. A. 9).

In view of the fact that both parties were allowed opportunity to present evidence at length on all issues, and in view of the fact that the trial judge has passed away subsequent to the decision of this case, we believe that if this court finds that the findings should be differently expressed, it will exercise its prerogative of making those findings rather than send this case back for another lengthy trial which could result in no other decision.

Under the views expressed by the court, any additional findings he might have made would necessarily have been adverse to appellant.

Appellant's complaint that the court has failed to find the amount of appellant's loss, is due, as we have heretofore pointed out, to the fact that appellant has offered no proof as to the amount of loss sustained with the exception of admittedly erroneous reports of accountants purporting to show an apparent inventory. The court has found against those reports, stating:

> "I find that the value of the stock at the time of the fire was approximately $88,000." (Vol. I, p. 178.)

The court also states that the testimony shows that at least 75% of the salvaged stock could be made into new bags (Vol. I, p. 185), and that the testimony of

disinterested witnesses shows that the damage was not in excess of 25%. The court has also stated that there was very little stock burned out of sight, and that if it were necessary for him to determine this amount of out of sight loss he would find it to be the difference between the perpetual inventory, namely, the approximate $88,000 of value which he finds, and the Radford inventory, or approximately $2000. The loss as found by the court, therefore, is susceptible of simple arithmetical calculation. If we take the maximum of $2000 as burned out of sight from the $88,000 of value found by the court, we find a remaining $86,000 which the court finds was damaged not to exceed 25%, or $21,500. This would, therefore, leave a maximum loss of $23,500 as against an original claim of $73,000 and a subsequent claim of $106,000.

The court has not reduced this arithmetical calculation, but it has found that the amount of damage is "so far below even the lowest claim of loss that unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent." (Vol. I, p. 182.)

The court has also found that the claim as to out of sight loss, amounting in one instance to $15,000, and the other to $46,000, cannot be supported, and has stated, as we have pointed out, that if it were necessary for him to determine this amount he would fix it at $2000.

We believe that the points raised under this first assignment of error have been amply covered in our

statement as to facts, the nature of the case, and the evidence produced.

Counsel refers to some of the cases cited by us relative to the question of Equity Rule 70½. He also calls attention to the dissenting opinion of Justice Butler in *Los Angeles Gas & Electric Co. v. Railroad Commissioner,* 289 U. S. 287. It will be noted, of course, that this is not the opinion of the Supreme Court but merely a statement in a dissenting opinion.

As to the case of *Panama Mail Steamship Company v. Vargas,* 281 U. S. 670, which went up from this court, we desire to call the court's attention to the fact that

> "The district court delivered no opinion and made no findings of fact other than such as may be implied from the decree. * * * The decree does not show on what premise of fact or law it was given, but only that it was given on some premise which in the court's opinion entitled the plaintiff to the decree."

Counsel also refers to various sections of Cal. Juris. and authorities to the effect that a defense which is not pleaded cannot be considered. We have no disagreement with these authorities. For instance, in one it is stated:

> "The complaint avers due proof of loss and a compliance with the conditions of the policy in other respects. The answer denies this allegation, sets out the proof of loss made, and points out several alleged defects in it *but does not charge that it is either false or fraudulent.* * * *" (Italics ours.)

It is also stated that there were objections to the proof. The court says:

> "It does not charge that it was wilfully false or untrue, states no facts constituting fraud, and does not claim a forfeiture has been incurred. As there was another apparent reason for giving the notice and for pleading it, I think the answer did not inform the plaintiff that fraud was charged or that a forfeiture would be claimed."
>
> *Greiss v. State Investment etc. Co.*, 98 Cal. 241, 243-244.

The answers in this case charge specifically that plaintiff violated the terms and conditions of the policy relative to fraud and false swearing in respect to statements made in his proof of loss and in the various complaints, and that at the time of making these statements he knew that the same were false and untrue, and that they were made for the purpose of inducing appellees to pay a loss in excess of that sustained.

AS TO THE SECOND ERROR RELIED UPON.

This error is in two parts, first, that the trial court erred in finding "that plaintiff was guilty of fraud and false swearing in his proofs of loss, and that there was over-valuation which resulted from an intentionally fraudulent attempt to get an excessive award from defendant insurance companies"; and, second, that "any defense of false swearing was waived".

The ground of this second error is quite remarkable in view of the fact that the first ground of error assigned is that the court made no finding. We now find appellant complaining because he contends that the court did find he was guilty of fraud and false swearing.

It is claimed that there is no basis for finding fraud in this case. The court has found that "the values in the original proof of loss were padded; they were padded in several pleadings filed in this case and in the attempted proof at the trial", and "that the over-valuation resulted from no such inadvertence but from an intentionally fraudulent attempt to get an excessive award from the insurance companies". The court, in his opinion, points out the evidence upon which he bases such a finding. We have already discussed this evidence earlier in the brief. Even assuming that there is evidence to the contrary, the finding of the trial court based on evidence, even though conflicting, must be sustained. We have already pointed out the law in this respect in our citations under the first assignment of error.

Appellant also contends that "the appellees have never parted with one dollar to appellant herein. They have always resisted appellant's claim, hence it is a necessary conclusion that they have never relied upon and never been injured by any statements or representations of plaintiff * * *". (Appellant's Brief, p. 20.) They then cite certain authorities with which we have no contention. In other words, that fraud without injury is not a defense, or

does not give rise to a cause of action. Appellant overlooks the fact, however, that the defenses relied upon here in this action, and the fraud and false swearing relied upon, are a portion of the contract entered into between the parties. We have already pointed out to the court the law relative to fraud and false swearing.

As stated in the authorities cited by us, the intent to deceive and defraud is necessarily implied in the intentional and wilful making of a false statement as to a material matter, and it is no palliation of the fraud that the insured did not mean thereby to prejudice the insurance companies. The law presumes every man to intend the natural consequences of his act and he cannot be heard to say that he did not expect to be believed. The mere fact that appellant was unsuccessful in his attempt to defraud does not justify the attempt or relieve him from the forfeiture imposed by the contract into which he entered. Again, if this court feels that the finding is too general, it is a simple matter for it to exercise its prerogatives and make a finding which will cover the situation. We do not consider it necessary to discuss the California authorities, as we have already pointed out the Federal authorities covering this situation, and the finding of the court that the fraud was wilful and intentional answers all the points raised in the authorities cited by counsel. We have also discussed at length all of the evidence referred to by counsel.

However, in regard to the contention that plaintiff did not know the facts and relied upon others, we

have not only the finding of the court upon this subject, but we also desire to again call this court's attention to the fact that appellant testified that he knew the figures in the reports of the auditors to be correct (Vol. I, p. 441); that he always paid attention to Calcutta prices and received cables and telegrams relative to prices sometimes every day, very often oftener than once a week (Vol. I, p. 527); that he was familiar with values on October 19th and on the day when he was testifying (Vol. I, p. 526); that he did all of the purchasing and selling for his company; that he informed adjuster Smith that the grades and prices were 100% right (Vol. V, p. 2754); that he was informed that if he swore to these prices he would vitiate his policy. (Vol. V, p. 2755.) Despite the contentions of appellant, the court has found, and properly so, that appellant did not rely upon his bookkeeper and accountants, but that he "knew what was in his factory and that his claim of loss was over-valued". (Vol. I, p. 181.)

Appellant also sets up some nine grounds showing the general basis of his claim. However, we have already discussed each of these points earlier in this brief, and the best that can be said in appellant's favor is that there is a conflict of testimony which has been resolved against him by the trial court.

Appellant also attempts to show that there was a waiver of any defense of false swearing. In making this contention appellant evidently overlooks the well settled rule of law that in order to rely upon waiver the *same must be alleged and proved.* There is no

allegation, nor has there ever been a claim until this appeal, that there was any waiver of the defense of false swearing.

Kohner v. National Surety Co., 105 Cal. App. 430;

Goorberg v. Western Assurance Co., 150 Cal. 510, 519;

Aronsen v. Frankfort Ins. Co., 9 Cal. App. 473;

Arnold v. American Insurance Co., 148 Cal. 660-668;

Bank of Anderson v. Home Ins. Co., 14 Cal. App. 208, 214.

It is interesting to note that in the brief it is stated:

> "* * * appellees for many months treated the policies as in full force and effect, and by their conduct waived any defense of fraud or false swearing, and the court should have so found." (Appellant's Brief, p. 19.)

> "Their conduct at all times was that the contract was in full force and effect and that they were liable thereon." (Appellant's Brief, p. 35.)

But, as strangely inconsistent as appellant is in many instances in the brief, we find under the same assignment of error the following statement:

> "The appellees have never parted with one dollar to appellant herein. *They have always resisted appellant's claim,* * * *" (Appellant's Brief, p. 20.) (Italics ours.)

Which statement are we going to accept? That the appellee always treated the contract as in full force and effect, and that they were liable thereon, or that they always resisted the claim?

AS TO THE THIRD ERROR RELIED UPON.

The claim of appellant is that the court erred in holding "that the heart of plaintiff's contention is that large quantities of goods were burned out of sight, and that unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent."

Counsel for appellant take the position that the use of the word "heart" must mean that this claim was the largest and most important element of the loss, and that such a statement was erroneous as the claim of loss on salvaged merchandise was nearly 80% of the amount claimed in the proof of loss. Incidentally, in this respect it is very interesting to note that appellant objected to the introduction of the proof of loss in evidence, and specifies as their fourteenth assignment of error that the court erred "in overruling plaintiff's objections to the admission in evidence of plaintiff's proof of loss, Defendant's Exhibit A, plaintiff not relying upon said proof of loss and claiming a greater loss than therein stated. Said exhibit details plaintiff's loss of merchandise in total sum of $73,601.96." (Vol. VI, pp. 3390-3391.)

This is particularly interesting as it will be noted that throughout the entire brief, with the exception of

two places, counsel dwells on the figure of plaintiff's claim of loss being $73,601.96, including a claim for merchandise burned out of sight of $15,645.25. This latter figure appears on pages 34, 38 and 52 of the brief. Apparently counsel for appellant are not very happy about the increased claim, which increase is due to claiming that approximately $46,000 worth of merchandise was burned out of sight. Counsel have studiously avoided this figure, and we do not find it mentioned in a single instance in the brief. Their whole argument is based on the original claim and $15,000 out of sight.

We know of no definition of the word "heart" showing it to mean largest or most important. It is often used synonymously with life, but is generally applied to that vital part which when stopped robs the body of life. In that respect, the statement of the court that the heart of plaintiff's contention is that large quantities of goods were burned out of sight is literally true. When we stopped that contention plaintiff's claim and hopes of recovery died.

We have heretofore shown that there is no evidence, outside of deductions from a report purporting to show the apparent inventory, to establish any loss out of sight. We have already treated that subject in detail, showing the inability of plaintiff to make any showing except that *he saw some ashes,* the inability of Mr. Taylor to identify any portion of the $46,000 of out of sight, the inability of Mr. Sugarman to specify any out of sight, and the fact that the report of the accountant indicating a loss out of sight was

entirely due to duplication of purchases. Before proofs of loss were filed, plaintiff and his adjuster were challenged to show anything that was burned out of sight. We repeated these challenges during the trial, and to date there has not been one iota of evidence to show what, if anything, was burned out of sight or totally destroyed. We have also treated the question of debris, showing that as a matter of fact there was no debris representing merchandise, and showing what the result would have been if we accepted the testimony relative to the removal of debris. The trial court was absolutely correct in stating in its opinion:

> "Unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent."

Although counsel for appellant would gladly overlook the figure of approximately $46,000 representing this out of sight merchandise, the evidence produced by appellant on the trial was all directed to sustaining this figure and not the $15,645.25. However, we believe that we have sufficiently pointed out the facts relative to this claim to convince this court that an attempt to recover even this item of $15,645.25 as a claim for merchandise out of sight, was false and fraudulent, and that the action of appellant in attempting to recover either this amount or the amount of approximately $46,000 could only justify a judgment in favor of these appellees.

Counsel cites, on page 44 of his brief, certain authorities to the effect that a mere overvaluation made

in good faith will not defeat a recovery. There is no question that such is the law. However, the merchandise involved in this claim was not of a character which would justify an overvaluation made in good faith. It was merchandise as to which appellant testified he knew the market value. He knew the type of merchandise which he, and he alone, was purchasing, and yet he subscribed and swore to a proof of loss showing merchandise of higher grades and prices than any which he had purchased. He deliberately increased prices by raising the grade of the merchandise, and he also made a claim, *not as he has stated at landed cost, but at retail selling price, plus ½¢ a yard.* This certainly is not a question of honest overvaluation, or the act of an honest man.

AS TO THE FOURTH ERROR RELIED UPON.

The basis of this claim of error is that "the court erred in finding that plaintiff knew what was in his factory and that his claim of loss was overvalued, and that he tried to escape responsibility for any overvaluation on the ground that the proofs were prepared by his employees, and in finding that their knowledge would be imputed to him."

If we were to admit all of the arguments advanced by counsel for appellant under this title, we would still find that appellant was guilty of false swearing during the course of the trial sufficient to void his claim. In this respect we refer to Exhibit 165, made up and prepared by plaintiff himself, and to his testi-

mony relative to that exhibit. This exhibit was produced and testimony relative thereto given by appellant on rebuttal. We have treated it at length under the heading "As to other false swearing by appellant during the course of the trial."

Under our discussion "As to pricing of Radford inventory and proof of loss", we have devoted considerable time to showing plaintiff's knowledge of the claim, his testimony relative to Defendant's Exhibit B, the fact that despite his knowledge of costs and the fact that he personally handled all sales and all large purchases, despite the fact that Sugarman agreed with Mr. Smith that the proof would be priced on replacement value in San Francisco, and despite the fact that appellant was warned that by using the method and prices adopted by him he was vitiating his policy, Hyland stated that "we will take all the chances on that". He proceeded to sign, swear to and present to the insurance companies a proof of loss, for the purpose of collecting a loss which he knew he had not sustained. He knew that that proof of loss, and the complaint subsequently verified by him, were grossly excessive and wilfully overstated. He had been warned that his actions constituted a breach of his contract, and that he would avoid that contract. He preferred to take his chances, and now that the court has found against him on the grounds of fraud and false swearing, he is attempting to hide behind an adjuster and his accountants and his bookkeeper, because he himself did not do the manual work of preparing the instruments which he subscribed and verified. Surely

the court could have made no other finding, and just as surely this court is not going to permit this appellant to resort to such a subterfuge. The parties who did the actual mechanical labor were employed by appellant and by him authorized to prepare these various statements. The result of their work was ratified and verified by appellant. He not only should have known, but did know, the falsity of these claims. To sustain appellant's contention would mean that it would be impossible to enforce the breach of a condition of a contract in the case of a corporation which must act through human instrumentality, or against an individual who has the means, or is smart enough to employ someone else to prepare false statements for his signature.

AS TO THE FIFTH ERROR RELIED UPON.

Appellant claims "the court erred in considering the suspicious circumstances surrounding the fire in connection with the alleged fraud and false swearing."

Counsel would infer that there were no suspicious circumstances in connection with this fire, as is evidenced by the statement in the brief:

> "If there were any suspicious circumstances surrounding the fire * * *". (Appellant's Brief, p. 61.)

These circumstances have been heretofore treated by us and are set forth at length in the opinion of the court. There is not one word of testimony to the effect that appellant knew nothing about these circum-

stances. On the contrary, we have the absolutely uncontradicted evidence of the Fire Marshal and his assistant that they were called to appellant's attention. We also have the testimony that he named three parties whom he considered responsible.

Counsel also states that there is no issue relative to the type of fire. The court will remember that one of our defenses was based on the ground of fraud and false swearing wherein we charged that appellant knew that the fire was of incendiary origin and swore that he had no knowledge or belief as to its origin. In addition to that, the fact that there were a number of separate fires in this building, that there was a great deal of merchandise saturated with kerosene, that there were pans and drums of kerosene scattered throughout the building, and that the fire was a "flash fire", are certainly indicative of a general scheme to defraud the insurance companies and support defenses of fraud and false swearing.

AS TO THE SIXTH ERROR RELIED UPON.

Appellant contends that "the court erred in considering that the amount of insurance carried on the stock was a suspicious circumstance."

We have already discussed in our brief the question of the amount of insurance. We have pointed out that much of this was new insurance, and that previous to a short time before the fire plaintiff had not carried use and occupancy insurance. We have also shown that in the event of a total destruction of the

plant, accepting values as shown by us, appellant would have profited to the extent of $250,000. Surely such evidence is admissible as part of the general scheme to defraud the insurance companies. There would have been no advantage to appellant in putting in a false and exaggerated claim if there had been no insurance for him to collect, or if the insurance had been insufficient to pay such a claim. On the other hand, if a party were charged with burning insured property, surely evidence that the insurance was less than the value of the property, and that instead of profiting by the destruction of the property, the insured would have sustained a loss, would be admissible. It follows also that where an insured stands to make a profit such as that which would have accrued to this appellant in the event of total destruction of the property, the fact that the insurance was of a new type, had been recently placed, and was grossly excessive, was certainly a circumstance when taken in connection with the proof of fraud and false swearing.

AS TO THE SEVENTH ERROR RELIED UPON.

Appellant claims that "the court erred in holding that the failure to settle the loss by arbitration was due to the conduct of plaintiff and his appraiser."

This appellee has no interest in this assignment as it almost immediately denied liability and never demanded an appraisement. We shall not therefore discuss the evidence referred to in the argument under this assignment. However, in connection with this

assignment of error, appellant brings up the question of the auction sale. It is stated:

> "The appellees consented to this auction sale". (Appellant's Brief, p. 77.)

We have already discussed this auction sale and shall not discuss it further except to question this and numerous other misstatements in this brief which we prefer to consider as unintentional and due to the fact that the writer of this brief has only been active in this case for the past five months. The only evidence of any kind relative to consent to an auction sale is that relative to the conduct of R. V. Smith, and this evidence was introduced only as to certain appellees, and on the objection of others, including this appellee, was not admitted as against them. R. V. Smith was not in any way connected with, or employed by, this appellee.

We have heretofore pointed out the misstatements on pages 19 and 35 that appellees for many months treated their policies as being in full force and effect, and were liable thereunder and participated in the sale of the merchandise at the auction. There is also a misstatement along the same line on page 48, namely, that "the pricing was done in accordance with an agreement or supposed agreement between Mr. Sugarman representing plaintiff and Mr. Smith representing appellees."

Again appellant states, referring to the method of pricing:

> "Certainly the adoption of this procedure pursuant to an understanding, or even a belief of an

understanding, with the *agents* of appellees cannot, by any stretch of the imagination, be deemed fraudulent." (Italics ours.) (Appellant's Brief, p. 57.)

It is also stated that

"The sale of the salvaged merchandise and its dispersion among the buyers thereof was clearly inconsistent with reliance upon an appraisal, and since this sale was consented to by the appellees they waived the appraisement." (Appellant's Brief, p. 77.)

This is not only a misstatement as to the consent to the sale by the appellees, but it will be remembered that the sale took place on April 22, 1930. The proofs of loss were filed on December 26, 1929. The policy provides that an appraisement must be completed within ninety days after the preliminary proof of loss, or the insured may bring action. (Vol. I, p. 312.) It is also provided that a loss shall be payable within thirty days after the amount has been ascertained by agreement or appraisal. (Vol. I, p. 313.) We therefore find that the time for completing an appraisal had expired a month prior to the sale.

On page 86 we found the statement referring to the question of prices, that

"The evidence shows that the whole matter was thoroughly discussed and there was full knowledge on both sides before the proofs of loss were filed."

The only evidence of any discussion relative to pricing was that with R. V. Smith, who did not rep-

resent this appellee. The evidence also shows that Smith informed Hyland that if he insisted on pricing the inventory in the manner then indicated, that he would vitiate his policy. To this Hyland replied that he would take his chances.

On page 97, it is stated that

> "In all except pricing, *appellees themselves participated,* and the pricing was done in accordance with an agreement, or supposed agreement between the adjuster for appellees and the adjuster for appellant; * * *".

Again we state that the only evidence of any kind as to participation in any of these matters, or as to an alleged agreement, was between R. V. Smith, who did not represent this appellee, and Sugarman. We have also shown that the pricing was not done in accordance with the agreement, which was on the basis of landed costs plus a reasonable expense, whereas the pricing was actually done on a retail price basis, plus ½¢ a yard, and in addition the grade of material was raised.

Again, on page 98, we find the statement that

> "* * * an auction sale of the salvaged merchandise was consented to by appellees * * *".

We have already discussed this relative to a similar misstatement of the facts.

It is also stated that

> "In view of the fact that appellees were given full access to appellant's books, that they were furnished everything they asked for, in so far as

> appellant's books are concerned, the statement of the trial court that appellant deliberately suppressed the records is not only entirely without foundation, but it is absolutely contrary to the evidence and demonstrates the erroneous view which controlled the trial court in making its decision in this case." (Appellant's Brief, p. 83.)

Here again counsel for appellant has gone beyond the limit to which we can extend an excuse based on ignorance of the facts. As a matter of fact, although we made a demand for the production of the books and records of appellant, this was refused. We made constant demands during the course of the trial, and it was not until after many days had elapsed and the court had repeatedly instructed appellant to produce his books that we were able to make any examination of any kind.

AS TO THE EIGHTH ERROR RELIED UPON.

Appellant claims that "the court erred in failing to find the amount of plaintiff's loss as represented by unsalvaged merchandise as distinguished from salvaged merchandise and burned out of sight merchandise."

In this respect appellant states, despite the fact that we find a constant complaint that the court failed to make findings, that "the court found the out of sight loss was approximately $2,000." Let us again repeat the court's statement in regard to this. It is said:

> "I believe that some of the stock was burned out of sight but that the amount was small. *If it were necessary to determine the amount of the out of sight loss, I should find* that it was the difference between the perpetual inventory kept by plaintiff as of the date of the fire, and the merchandise removed after the fire and counted by Radford, or *approximately the sum of $2,000.*" (Italics ours.) (Vol. I, p. 185.)

It will be remembered that there is not one word of evidence introduced by appellant to show the value or the kind of merchandise which was burned out of sight. True, in the proof of loss, and in the memorandum, Exhibit B, it shows a contention that over $15,000 was totally destroyed or obliterated. It is also true that the only method of accounting for the $46,000 discrepancy as indicated by the second report of Hood & Strong, is to claim that this was merchandise burned out of sight. We have already pointed out that neither appellant, nor his bookkeeper, Mr. Taylor, nor his accountants, nor his adjuster, Mr. Sugarman, could enlighten the court in any way as to where this merchandise was or of what it consisted. On the other hand, the witnesses produced by appellees showed that there was no out of sight loss. The trial court resolved this question to the effect that the out of sight loss, if any, did not exceed $2,000. Being based on a lack of testimony on the part of appellant, and positive testimony on the part of appellees, there is not even a conflict in the evidence and the decision of the trial court will undoubtedly be sustained by this court. The only attempted proof was as to the question of debris.

Again, apparently counsel for appellant has not been able to accept the figures produced, and the claims made at the trial, for he has seen fit to reduce the amount of debris from 100 tons to 70 or 80 tons claimed to have been hauled away after the fire. The best that can be said for appellant in this respect is that there is a conflict of the evidence which the court has resolved against him. In this respect the court states:

> "As to the quantity and character of the debris there is serious conflict of testimony. In the light of the evidence which I have just discussed *it is incredible that the debris consisted to any large extent of ash or stock burned beyond recognition.*
>
> Not only does the proof show *negatively that there was no substantial quantity of merchandise obliterated by the fire,* but it shows affirmatively that the amounts claimed were fraudulently built up." (Vol. I, pp. 185-6).

In view of the fact that there is a positive finding of the court based on conflicting evidence, this court will undoubtedly sustain the finding of the trial court. We have heretofore discussed the question of debris and have shown the results of appellant's contention in this respect.

AS TO THE NINTH ERROR RELIED UPON.

Appellant claims that "the court erred in finding that the pricing and grading of the merchandise on the Radford inventory was fraudulently padded, and

that there was deception as to price or quality, and fraudulent manipulations of records by plaintiff."

We have already discussed at length the question of pricing of the Radford inventory and the raising of the 36-8 burlap to 36-9 and 40-8 to 40-10. We have also shown that appellant has admitted this change of grades in his Exhibit 165.

In regard to the statements of the court as set forth in the extracts of the opinion on pages 81 and 82 of the brief, we have already pointed out that these statements are amply supported by the evidence. The best that can be said in appellant's favor is that in some instances there is a conflict of the evidence. In view of the fact that the trial has resolved this conflict in favor of appellees, his findings will undoubtedly be followed by this court. As a matter of fact, counsel for appellant admits that "it was a fact that certain merchandise appearing on the Radford inventory was not correctly graded," and yet, as we have shown, Mr. Taylor, under the instructions of appellant, priced these goods knowing that they had no merchandise of that description, putting on them a price as though they actually possessed such merchandise, and at a figure ½¢ in excess of retail selling price.

As we have also shown, appellant signed and swore to the proofs of loss setting forth thousands of yards of material of this description, although he also knew that they had no such merchandise as he made all purchases and sales. We have also shown that in this sworn proof of loss he set forth the replacement value of bags at a figure of $30 a thousand in excess of their

selling price. Surely there could be no better proof of fraudulent padding of the price.

As to the contention that there were no manipulations of the records by plaintiff, we have discussed at length the various stock sheets numbered 2187, 2199, 2200 and 559. We have shown that whereas stock sheets were numbered chronologically, and were dated, the dates on these stock sheets had been changed and they were so manipulated as to attempt to substantiate duplications amounting to an excess of $30,000. Such changes and manipulations could not be other than fraudulent. Again, the best that can be said in favor of appellant's contention is that there is a conflict of the evidence, which has been resolved against him by the trial court who had the opportunity of examining these exhibits at first hand, and of listening to the witnesses on both sides.

As to appellant's contention that the amount claimed by plaintiff would not overtax the factory building, we desire to call to the court's attention that we do not claim that merchandise of the value of $132,000 would have overtaxed the building, or that this building could not have held merchandise representing such a value. It is our claim, and we believe we have heretofore amply demonstrated the same, that to give any effect to appellant's claim that there was 100 tons of debris, or even 70 or 80 tons of debris representing the remains of merchandise totally destroyed or obliterated, the building would not have held this amount of merchandise. In addition we have shown that the debris would have represented obliterated merchan-

dise of a value of approximately $320,000, whereas appellant's highest claim is that there was merchandise of the value of $132,000 in the building as against the figure of $88,000 as shown by his perpetual inventory. We also claim that it has been amply demonstrated and it has been found by the trial court as a matter of fact that the value of the merchandise on the premises at the time of the fire did not exceed $88,000, and that practically all of this merchandise was salvaged. We have also shown, and it has been found by the court, that 75% of the salvaged merchandise was not damaged in any way by either fire or water.

AS TO THE TENTH ERROR RELIED UPON.

Appellant claims that "the court erred in finding that plaintiff ever or at all, repudiated the accuracy of plaintiff's books."

Appellant refers to the following finding of the court:

> "Plaintiff, on the witness stand, devoted most of the first day of the trial to establish the accuracy and completeness of his books. Numerous forms were introduced in evidence which had been devised by him as the careful executive in direct supervision of his business, to follow the materials from receipt through the process of manufacture and sale so that at any time the contents of the factory could be calculated. Subsequently, in the course of the trial plaintiff repudiated the accuracy of these books." (Appellant's Brief, p. 90.)

In the brief it is stated:

> "The record shows that appellant made no statement as to the accuracy of his books, nor did he ever repudiate their accuracy. * * * He made no claims or representations in reference to his books, but at all times invited their examination by accountants for appellees." (Appellant's Brief, p. 91.)

We have already pointed out that instead of inviting any examination by appellees or their accountants, appellant threw every possible obstacle in the way of the appellees and refused to permit them or their accountants to examine these books. Even when the court ordered such an examination it was made as difficult as possible for our accountants to have access to these books. In view of this statement of counsel for the appellant, and in view of the fact that it is said it is made "to show the complete error of the viewpoint under which the trial court was laboring when deciding this case", we desire to refer to two statements of counsel which do not appear in this transcript, but which we quote from the typewritten reporter's transcript. As we have heretofore pointed out, we do not like this form of procedure, but in view of attacks that have been made on a judge who has been summoned from our midst, we believe we are justified in calling the court's attention to matters upon which he based statements in his opinion which were known to all the counsel in the case. These statements are made by counsel who did not sit through the trial, and are either based on ignorance or on a deliberate attempt to mislead this court.

"Mr. Schmulowitz. I may say for the benefit of the Court that it is to disclose to the Court the comprehensive records that were maintained by the Hyland Bag Company in the prosecution of its business during the year 1929, and that was in full force and effect at the date of the fire, supplemented by other books and records, all of which records have been made the subject of audit on the part of various firms of certified public accountants in order that the Court may ultimately determine the weight to which the audits made by the certified public accountants are entitled. * * * *It is quite natural for counsel to question and for the Court to call upon the plaintiff to explain why, if the plaintiff after a fire files a proof of loss in which he first asks for some seventy thousand dollars odd, does he later come into court and inform the Court that instead of his loss being some seventy thousand dollars odd, that in truth his loss is some one hundred and eight thousand dollars. Now, in order to fully explain that, it becomes in part important to understand the comprehensive system of records that were maintained by the plaintiff at the time of the fire and prior thereto.* Later on there will be disclosed the basis or formula upon which the first proof of loss was filed, the inaccuracies and fallacies of that report will be disclosed to the Court, and the accuracy and the dependable quality of the present claim will be demonstrated by men skilled in the profession of accounting and by actual reference to original records of which these forms are mere exemplars of the records maintained in the office of the Hyland Bag Company.

* * * * * * *

Mr. Thornton. In addition to that I would like to point out this fact: *You will remember we have asked for an examination of these very carefully kept books, but so far we have been deprived of any examination.*

Mr. Schmulowitz. Evidently the Court thought you were not entitled to an examination at the time you asked for it." (Rep. Tr. pp. 31-33.) (Italics ours.)

Later on, and after we had pointed out the changing and juggling of the records and accounts by this appellant, Mr. Schmulowitz states:

"Counsel says that the books are filled with inaccuracies. I admit it. I proclaim that. I proclaim the inaccuracies. I am not relying upon the books for the simple reason that the books are replete with errors, and being so, is the Court going to decline to go behind those errors in the books?" (Rep. Tr. p. 1077.) (Italics ours.)

Surely the trial court did not refuse to go behind the errors in the books. He went farther and found that the errors and changes in the records were made by or under the direction of the appellant for the purpose of cheating and defrauding these insurance companies. If we have failed to convince this court of these facts, it is due entirely to our inability to properly summarize and brief the evidence, which was absolutely conclusive along these lines. The evidence relative to the forms of records to which the court refers, which covered practically an entire day's testimony, is boiled down in the transcript in

this case to pages 262 to 282, inclusive, Volume I. Appellant states:

> "These forms were made up by me." (Vol. I, p. 267.)

In regard to their broken bale lots, he says:

> *"We were always able to account for every yard."* (Vol. I, p. 281.) (Italics ours.)

One of appellant's witnesses, and employee, Willis G. Ledgett, testified:

> "In the movement of that material records were kept and checked on the various forms in use by the Hyland Bag Company, because it was our duty to check every bale of merchandise that entered the house, because the United States Government checked over our scales and assessed the duty on weights we gave the Government. *Therefore, we knew the weight and the number of every bale that came in the house."* (Vol. II, p. 634.)

We have already shown that Taylor testified that they had fine records from May 31st to October 19th, and that he would say that 99.9% of the information as to the receipt of goods is correct. We shall not attempt to again set forth the testimony as to the inaccuracy of the records or as to changes in them. Nor shall we analyze the testimony of the various accountants relative to these books. Mr. Taylor, after we had pointed out these changes and inaccuracies, tells us that he had not touched the books and that they were not closed until November. (Vol. III, p. 1534.) He further states:

> *"As to telling you that my books were very inaccurate, well, every man that has handled them has so testified."* (Italics ours.) (Vol. III, p. 1579.)

AS TO APPELLANT'S QUERY "IF APPELLANT IS ENTITLED TO RECOVER, WHAT IS THE AMOUNT HE SHOULD RECOVER, AND HOW SHOULD IT BE APPORTIONED?"

To state the situation in slightly different language from that employed by appellant, we desire to state it is equitably unthinkable that the judgment herein should be reversed. Appellant's counsel states that the

> "* * * loss probably lies somewhere in between the amount admitted by appellees and the amount claimed by the appellant, that is, somewhere between $35,000 and $106,000." (Appellant's Brief, p. 99.)

Yet, appellant has never introduced any evidence which would show that he actually suffered loss or damage, or of what that loss or damage consisted. On the other hand, we have affirmatively shown, and the court has decided, that the claim presented was false and fraudulent and made for the purpose of attempting to cheat and defraud these insurance companies. Counsel states:

> "It is to be noted that at the time of the fire appellant had a net worth of $325,000.00 to $375,000.00; that his sales averaged over $2,000,000.00 per year, and that he had unusual bank credits indicating that he was a man of good reputation and standing in the community (V. I, p. 547); he was a director and large stock-

holder in a local banking institution. (V. I, p. 235.) The decision herein reflecting upon the character of appellant has swept away the work of years and inflicted immeasurable injury upon him as a business man." (Appellant's Brief, p. 95.)

We are indeed glad that appellant has made such a plea. We could have some sympathy with a man of small means and a man of no standing in the community who might attempt to recover a little more than his small loss. The mere fact that this appellant was a director and large stockholder in a local banking institution, and that he was worth in excess of $300,000, certainly does not show he had a good reputation. Many a man has accumulated means by the use of crooked and fraudulent methods. This appellant has been exposed in this one instance. We are indeed glad that this decision of the trial court, with its sweeping indictment of the character of this man, was directed at a person of wealth. It goes far to disprove the current statement that the courts will penalize only the poor and not the wealthy. If appellant did have a good reputation, and if he did have a standing in the community, he should have considered that reputation and that standing before attempting to perpetrate such a fraud as we were able to uncover during the course of this trial.

As to sweeping away the work of years, our evidence shows that as a matter of fact the loss was nowhere near so great as we at first thought, that instead of being somewhat less than $35,000 it was approximately $10,000. The penalty imposed upon

this appellant for his fraud, false swearing and perjury is indeed only too small. The boldness of the request that "appellant asks this court to restore both his good name and his purse to him" (Appellant's Brief, p. 96) is in line with the attempted burning of this plant and the attempted defrauding of the insurance companies. The lower court expressed his reluctance to find that any man could follow the course of action adopted by appellant, and those of us who knew that judge can well realize his reluctance to find that anyone was a crook and a perjurer.

Appellant closes his brief with a prayer that this court "compensate appellant for his loss and vindicate his honor in this community". (Appellant's Brief, p. 99.)

We respectfully submit that this court should affirm the judgment and let this appellant stand forth in this community with the brand which the trial court was forced to put on him as a result of his own fraud, false swearing and perjury.

Dated, San Francisco,
April 17, 1936.

Respectfully submitted,
H. A. THORNTON,
THORNTON & WATT,
THORNTON & TAYLOR,
Attorneys for Appellee,
Western Insurance Company of America.

No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company,

Appellant,

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEE, MILLERS NATIONAL INSURANCE COMPANY.

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BRIEF FOR APPELLEE, MILLERS NATIONAL INSURANCE COMPANY.

INTRODUCTION.

We agree with the attorney for the appellant in only one thing, namely, that this case is extraordinary. It can be so characterized not only because of the size of the record and the length of the trial, which started on October 13, 1931, and concluded on January 26, 1932, but also in view of the patience and vision of the trial judge, and the clear and comparatively brief way in which he has expressed the facts which were developed during the many weeks of the trial.

Counsel complains of the bitterness of the opinion because the court sets up in detail the facts upon which it finds that "in order to avoid any possible misunderstanding, I find the plaintiff was guilty of wilful and intentional fraud and false swearing in making his proofs of loss". (Vol. I, p. 233.)

In the preparation of a transcript of this length, it is only natural that due to inadvertence and the tremendous mass of testimony, there should be omissions of matters which may prove to be important. We are stating frankly, at the commencement of this brief, at two places we have quoted statements of the attorney for appellant which support findings of the court, and which will tend to shorten the brief, which must under any condition be fairly lengthy. We would not incorporate these statements if it were not for the attack made by counsel for the appellant on the trial judge, and we shall clearly designate in our brief the instances where we have incorporated such quotations.

Counsel also complains that by the decree appellant has not been able to defraud the various insurance companies, and that there is attached to his name the stigma of being guilty of wilful and intentional fraud and false swearing. These are matters which the appellant should have considered before embarking upon a course of action which would cause a Federal Judge to state:

> "Turning again to the question of fraud, since fraud is never presumed and since a forfeiture should not be decreed unless the evidence clearly warrants it, I have discussed with some detail the evidence which I believe supports my finding that plaintiff was guilty of fraud and false swearing in connection with his proofs of loss, and the pleadings and testimony in this case, and that his conduct has barred his right of recovery herein. I have not, however, discussed all of the evidence which supports my decision but have selected that which best illustrates, in my view the attitude and conduct of the plaintiff. Because of the serious reflection of this decision upon plaintiff, I have reached it reluctantly but feel that it is necessitated by the evidence introduced in the case." (Vol. I, p. 203.)

Counsel has referred to the fact that equity abhors forfeitures. While this is ordinarily true, equity will not refrain from enforcing a forfeiture where the evidence clearly shows the same should be enforced. Counsel also apparently overlooks the maxims that "he who seeks equity must do equity", and "he who seeks equity must come with clean hands".

AS TO THE FACTS.

AS TO THE NATURE OF THE ACTION.

The appellant originally filed proofs of loss claiming a merchandise value on hand at the time of the fire of $102,453.23, with a total loss and damage of $73,601.96. Out of this amount of loss set forth in the proof it was claimed that $15,645.25 represented "merchandise totally destroyed", in other words, "merchandise burned out of sight", as it is referred to in the testimony and in the brief of appellant. (Vol I, p. 423.) Thereafter, on the 19th day of June, 1930, appellant filed and served on appellees a claim that his loss, as a matter of fact, amounted to $76,-498.62. Four days later suit was filed in the Superior Court of the City and County of San Francisco in an attempt to recover this latter amount. The case was removed to the Federal Court and an amended complaint was filed claiming that the loss sustained by reason of the fire was actually $106,992.83. This claim presupposes merchandise totally destroyed or, as stated in Appellant's Exhibit B, "obliterated or out of sight", of a value of $46,139.46. (Vol. I, p. 440.) The appellee, Millers National Insurance Company, denied the claims set forth in the amended complaint, but admitted a value to the stock of a sum not in excess of $75,000, and damage to the property not exceeding $35,000. At the time of admitting that amount of loss this appellee did not have in its possession information developed later which showed that as a matter of fact the loss did not exceed the sum of approximately $10,000.

In addition to these denials this appellee set up a number of affirmative defenses based on the provision of the policy that "this entire policy should be void, * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss." The affirmative defenses pleaded are as follows:

1. That in addition to the provision voiding the policy for fraud and false swearing, it is provided that the insured shall file proofs of loss in which he shall state, among other things, "his knowledge and belief as to the origin of the fire", and that appellant prepared and served upon appellee a proof of loss in which he stated that the fire occurred "which originated from causes unknown to this assured", and that he verified said proofs of loss, stating that the same was true and "that no material fact is withheld that the companies should be advised of." That said instrument was prepared for the purpose of making claim and inducing this appellee to pay a loss under said policy, and that said statements were untrue in that appellant at all times knew that said fire was of incendiary origin.

2. That appellant prepared and served upon appellees proofs of loss claiming that the damage caused by said fire amounted to the sum of $73,601.96, whereas in truth and in fact he well knew that the loss and damage did not exceed the sum of $35,000.

3. That on June 19, 1930, appellant caused to be prepared and served upon appellees a claim that the

loss by reason of said fire amounted to $76,498.62, whereas at all times he well knew that the loss by reason of said fire did not exceed $35,000.

4. That on or about the 23rd day of June, 1930, appellant filed and caused to be served upon appellees a complaint to recover the sum of $76,498.62, whereas at all times he well knew that the loss by reason of said fire did not exceed $35,000.

5. That on the 22nd day of October, 1930, appellant verified, filed and caused to be served upon appellees an amended complaint in the District Court, wherein he sought to recover from appellees the sum of $106,992.83, whereas he well knew that the loss and damage by reason of said fire did not exceed $35,000.

For a further, separate and distinct answer and defense appellee pleaded the provisions of the policy providing for a method of appraising the amount of loss and damage, and further providing that no suit or action should be sustained until after full compliance with said conditions, and that an appraisement was not had due to the acts of appellant and the appraiser appointed by him, and that the action was commenced before compliance with said provisions of the policy. (Vol. I, pp. 48-50.)

AS TO THE INSURANCE CARRIED BY APPELLANT.

At the time of the fire appellant had in his possession policies and cover notes covering the stock aggregating $185,000. Of this sum $12,500 in the Dubuque Fire & Marine Insurance Company, and $5000 in the Minnesota Fire Insurance Company, and $17,500 in the Millers National Insurance Company had been written in April, 1929, $5000 in the Merchants Fire Insurance Company was written in May, $10,000 in the Firemen's Insurance Company was written in June, $50,000 in the Western Insurance Company was written in August, $15,000 in the National Liberty Insurance Company was written in September and $70,000 in the National Liberty Insurance Company written in October. (Appellant's Exhibits 31-39, inclusive.)

In addition to this insurance plaintiff took out $120,000 on use and occupancy, although he had never carried this type of insurance prior to May, 1929. (Vol. I, p. 529.) He also had $96,000 on furniture, fixtures and equipment. (Vol. I, pp. 174-5.) In other words, with the insurance recently placed on this plant, in the event of a fire resulting in a total loss of its stock and equipment, R. C. Hyland would have collected from the various insurance companies $401,-500. Granting that the values of the machinery and equipment were $96,500 (for we were unable to produce any evidence on this subject at the trial, due to the fact that the property involved was only stock) and taking the figures set forth in Defendant's Exhibit UUU (Vol. V, p. 2723) which figures, by the

way, have never been attacked, which show an actual cost to the insured of this stock to be $66,626.05, with a loss of $10,171.92, we find that as against a total value of stock, machinery and equipment of $163,000 appellant would have collected $401,500, or a net profit to him of approximately one quarter of a million dollars.

If we take the statement of the court that "I find that the value of the stock at the time of the fire was approximately $88,000" (Vol. I, p. 178) and add this to the $96,500, representing the machinery and equipment, we would find a total value in the plant of $184,500, which would have left this appellant a profit of $217,000 in the event that this plant was totally destroyed by fire.

Surely, such a situation, when coupled with the evidence which was produced at the trial, would have justified the court in finding that there was a motive and a reason for the incendiary fire which followed.

AS TO THE NATURE OF THE FIRE.

The court has so clearly and briefly set forth the facts in connection with this fire that we shall quote from the findings of Judge Kerrigan. (Vol. I, pp. 175-6-7-8.):

> "Considering the first defense, the evidence clearly shows that this was a 'set' fire and that plaintiff knew it when making his proof of loss. The fire occurred on Saturday evening, October 19, 1929. It had reached sufficient proportions to be detected and the alarm rung by 10:36 o'clock. Plaintiff and his manager of the factory, Miss Mitchell were the only ones in the factory in the late afternoon; they were there continuously until they left at about six-thirty except for an hour between four and five when plaintiff went for a walk because of a headache. After Miss Mitchell had gone through the factory locking the windows, they locked the factory and went to their homes. Plaintiff was informed of the fire by phone, notified Miss Mitchell and returned with her to the factory about eleven P. M. The fire lasted but a short time after the alarm was responded to according to the fire department officials in charge of extinguishing it. The following morning plaintiff returned to the factory as did the representatives of the fire department, the police department and fire patrol. Because the fire had apparently started in several different places and because of a prevailing smell of kerosene, the fire patrol and the police department were investigating a charge of incendiarism. Plaintiff was advised of this and asked who might have set the fire. He suggested three discharged employees who might have grievances

against him. His attention was directed to the various suspicious circumstances which I shall mention.

The witnesses testifying to the circumstances surrounding the fire are of two groups—the chiefs of the fire department in charge of fighting the fire and the men in charge of the fire patrol. Plaintiff has vigorously attacked the credibility of the latter witnesses on the ground of bias and interest. Their positions are created by law but their salaries are paid by the Underwriters' Fire Patrol of San Francisco. It is their duty to keep down loss by protecting stocks of goods from water damage and to investigate fires which are apparently of incendiary origin. The testimony of these men has, on so many material points, been corroborated by the fire chiefs, who are entirely disinterested witnesses, that I do not believe that their credibility has been shaken. The circumstances testified to show that there were four separate and distinct fires. In all but one of them there was evidence that kerosene had been used to start them. One fire originated on the first floor in back of the office and spread to the mezzanine. The fire started in a pile of burlap bags which had been soaked in kerosene. The kerosene had seeped through the floor and had soaked into bales of burlap directly under this in the basement. The principal fire was in the stair well and started on the second floor. This fire was entirely separate from the one just described. It was some thirty feet away and the door leading from the first floor to the stair well had been closed. There was no burning between. The type and depth of the burning of wood in the stair well indicated that it was a

'flash' fire or gas fire such as would result from the burning of the volatile gas kerosene gives off. The stairwell showed little or no evidence of burning between the first and second floors. On the second floor just outside the stairwell, near the open door leading to it, was a shallow pan of kerosene with cut pieces of burlap soaked in it. Another pan of kerosene was found on the same floor about sixteen feet away. There was another fire on the second floor in some *bails* of burlap across the room from the stairwell fire. Its origin was unexplained and there was no burning between the fires. On the third floor apparently another fire had been started near the stairwell. There was a drum of kerosene in which a hole had been punctured near the bottom standing by the door to the stairwell. Some oil seeped out, but as the cap had not been removed from the top, it did not flow freely and became 'air bound'. On this same floor there was another drum of kerosene on its side with several holes punctured about three inches from the floor. The kerosene had saturated the floor nearby for a distance of four or five feet. The fire did not reach this location. The fire in the stairwell burned up into the fourth floor where it mushroomed to the ceiling and burned through to the roof. Significantly, the pans filled with kerosene and rags did not belong where they were found, but belonged under certain machinery and the drums of kerosene had been dragged up from the basement. That the incendiarist was an amateur was shown by his leaving the caps on the drums and by his failing to open the windows and thus feed the fire with the necessary ogygen."

In this connection it is interesting to note that not only does the testimony show, without contradiction, that there was very little damage to the building, but also the court visited this building and had the opportunity of seeing conditions at first hand. Judge Kerrigan went over this building from roof to basement. (Vol. IV, pp. 1731-1746.) He saw the type of construction, the fact that much of the wood was oil-soaked, but unburned. He saw that lint and fibre, resulting from the manufacturing process still remained, also unburned. He saw that the fire had not been of sufficient intensity to even burn splinters and "furring" of the wooden beams.

In regard to the machinery, the court had not only the testimony of Arthur Langrock, an employee of the Pacific Diamond H Bag Company, who removed this machinery to, and installed it in the plant of the latter company, that there was no fire damage to the machinery (Vol. IV, pp. 2075-2077), but also the court visited the premises of the Pacific Diamond H Bag Company and personally saw this machinery and its condition.

Photographs were taken by the Police Department showing the conditions in the plant and the extent of the damage to the stock.

The evidence is uncontradicted that this was a flash fire. R. V. Smith states:

> "Well, this was a flash fire, and it seemed to me as though it just hit the edges of these piles, here, the first four or five piles, and the edges near the fire had been singed, and that was very noticeable, because there was just a certain height

that this flash had hit the piles, and it had not been of long duration, because the lower part of the piles were not burned at all." (Vol. V, p. 2680.)

Fire Marshal Kelly states:

"No, the casing of the stair well was not entirely consumed, it was not, I would consider that that was burned, with what we would classify a flash fire. The evidence there showed it had been a flash fire, for the reason that the amount of the tongue-and-groove surrounding the partition of the stair well was burned to such an extent that there had to be some fuel burned beyond recognition to create that amount of burned vapor without the burned material burning." (Vol. IV, pp. 1967-8.)

These witnesses, and many others, testify as to the separate fires and as to the use of kerosene. We shall not quote the testimony at length as there is no contradiction of it.

Fire Marshal Kelly also tells of his interviews with Mr. Hyland and Mr. Hyland's statements that he suspected three former employees. (Vol. IV, pp. 1983-4-5.)

AS TO THE EXTENT OF THE FIRE.

In addition to the first hand knowledge of the extent of the fire gained by the court in visiting the premises, and in addition to the testimony of the adjusters and various other parties who were in the building after the fire, we have the testimony of the

men who actually fought this fire. Battalion Chief John Mahoney, whose company was situated only two blocks from the scene of the fire (Vol. IV, p. 1890), arrived there within a minute or two. The fire was coming through the roof in the rear, he did not see any fire on the first floor nor could he see any fire through the window of the second floor, where he felt the glass, which was cold. There was some fire on the third floor and there was fire on the fourth floor around the stairway and the skylight. (Vol. IV, pp. 1891-2.) He says that it took them approximately twenty or thirty minutes to get this fire under control. (Vol. IV, p. 1892.) He stayed on this floor for a while after the fire was out, looking for any signs of fire, and overhauling the stock and they were back at the fire house at 11:55, a period of one hour and seventeen minutes. (Vol. IV, p. 1893.)

Battalion Chief Edward D. O'Neill was all over this building the night of the fire and describes the conditions. In describing the fire on the third floor he states:

> "As to how long was it from the time that I got there until we had the fire under control (not overhauled), but under control and started to send the companies home, the principal fire, we got it out so fast it was not twenty minutes that they were working, and you could say twenty minutes on the top floor, for the last place of living fire, or visible fire, fifteen minutes on the third floor, less than ten minutes on the second floor, and possibly three-quarters of an hour on the mezzanine and first floor." (Vol. IV, pp. 1835-6.)

This chief was familiar with fires of this sort, having taken part in fighting the fire at the Pacific Bag Factory where it took them eighteen hours to overhaul a fire in a similar stock, and where they kept a line on the fire for a week, and having fought the Nottson Factory fire, where it took them eleven hours to overhaul and kept a line on for fourteen hours thereafter. (Vol. IV, p. 1848.)

As to the Hyland fire, he states:

> "As to what was the damage that was caused by that fire, well, with the occupancy of that particular building, we would say it was a small loss, that it was rapidly extinguished, in fact, we prided ourselves on the stopping of that particular fire; on coming in on the alarm of the fire we thought we would lose the building, and then it was just a question of confining the fire, and then we found out in a short period of time that this fire was under control, so we were congratulating ourselves on our work as firemen, self-praise, as it were, and it was followed up by the chief of the department in lauding everybody that had taken part in the fire. It was the fastest stopped fire that I have ever seen in my life in an occupancy of that sort." (Vol. IV, pp. 1849-50.)

The testimony of W. D. Gardner shows that as a matter of fact the thread was not even burned off the machines on the fourth floor, except on the first three machines closest to the fire. As a matter of fact, this thread was not discolored. (Vol. V, p. 2452.)

This witness also testified that the rolls on the presses on the third floor had not started to run.

These rolls are made of glue and glycerin and are so sensitive that in the valleys of California these rolls would melt down due to heat in the summer. The witness demonstrated that these rolls would blister after having water applied to them, and made a demonstration in court. He also testified how rolls would sag at a temperature of 110 to 120 degrees, but that the rolls on the third floor had not started to run. (Vol. V, pp. 2458-60.)

AS TO THE VALUES AT THE HYLAND PLANT.

It will be remembered that in addition to the factory at 243 Sacramento Street, where the fire occurred, appellant also had a warehouse at 1328 to 1340 Sansome Street. Nowhere in the books or records of the appellant is there any segregation showing values at the Sacramento plant or at the Sansome Street warehouse. *However, as we shall point out to the court, there is absolutely clear and convincing proof that the value at Sacramento Street must have been less than $90,000.*

The books show a total valuation at both places amounting to $153,056.36. While there is considerable testimony to support this, we are satisfied to refer only to the stipulation as to this figure. (Vol. III, p. 1528.)

The book inventory at Sansome Street as of October 19, 1929, the date of the fire, as shown by Hood & Strong, was $64,074.33. This is $401.56 greater than is shown by an actual physical inventory taken at

the warehouse following the fire. This inventory taken by Mr. Taylor and Ledgett, showed a value at Sansome Street on October 19 of $63,672.77. (Vol. I, p. 253.) Deducting the physical inventory at Sansome Street from the total valuation at both places, we find that the value at Sacramento Street, as shown by the books, amounted to $89,383.59. If we deduct the book inventory at Sansome Street as of October 19, we find that the book inventory at Sacramento Street on the date of the fire amounted to $88,982.03.

This figure is very important as it differs by only $709.48 from the "perpetual inventory" kept by Taylor, and by only $2165.72 from the inventory taken by Radford at Sacramento Street after the fire, and incorporated in the proof of loss sworn to by appellant showing a value at Sacramento Street of $86,-816.31. This discrepancy of $2165.72 shown in the Radford inventory is more than accounted for by increases in the quality of the burlap, which will be shown later, and which are admitted by appellant.

These figures as to values are shown by a "perpetual inventory", or "summary of stock sheets", as appellant prefers to call it. True, Mr. Taylor, the bookkeeper for appellant, denies that he ever had such a document, but he admits he did make up a summary in November or December, 1929, for his own use. Appellant admits that Taylor did keep a perpetual inventory. (Vol. I, pp. 447 and 499.)

Rosslow, the accountant representing Ernst & Ernst, and a witness most reluctant to give any testi-

mony favorable to appellees, admitted that he had seen and checked such a perpetual inventory in June of 1929.

"As to knowing that the Hyland Bag Company maintained, with regard to burlap, a perpetual inventory, with lot numbers, and showing the amount used, so that they could, from time to time, tell how much of each of the lot numbers was on hand, each of the materials represented by the various lot numbers was on hand, I believe they did. *That is right, answering your question 'And you saw that at the time you were going through their books'.*" (Italics ours.) (Vol. II, p. 887.)

"Mr. Palmer. Now, give us the work sheets on the perpetual record, please—the so-called stores on hand, the perpetual inventory account. They kept one; you have stated here two or three times that they kept one. I want to see what your work sheets show on that.

A. As I recall that, I would check to their record.

Q. But have you the data on that?

A. I don't believe I would have such data.

Q. I would like any reference to that account, please what have you there, Mr. Rosslow?

A. This is a summary inventory prepared by Mr. Taylor.

Q. Might I see that, please? This was given you at the time you were making this audit, was it, by Mr. Taylor?

A. Yes.

Q. And purports to represent what?

A. *It is a recapitulation of the inventory, according to Mr. Taylor.*

Q. *Of his inventory?*
A. *Yes.*
Q. *His perpetual inventory?*
A. *I don't know whether he kept a perpetual inventory or not.*
Q. *Well, he kept an inventory of which this is a recapitulation?*
A. *That is right.*
Q. *In his books?*
A. *Yes.*

The set of sheets identified by the witness called 'Inventory, Hyland Bag Company, May 31, 1929' consisting of one sheet in longhand and attached thereto three sheets in typewriting with certain pencil notations thereon, was marked 'Defendants' Exhibit L for identification'.

That particular compilation that has just been introduced for identification would not be shown in that much detail by the ledger, but the ledger would agree in the total. Yes, the detail comes from some other record. That is right, kept by Mr. Taylor. Yes, as I recall it, *I must have seen this other record or account, because I checked to this—certain pages or certain lot numbers. That is right, Mr. Taylor kept another account in more detail on the question of inventory than would appear in the ledger. It is the account from which this material contained in Defendants' Exhibit L for identification came from, that is right.*" (Italics ours.) (Vol. II, pp. 893-4-5.)

"That is right, this inventory of work sheets on the inventory of May 31, 1929, furnished me by Mr. Taylor 'is supposed to be the detail of a perpetual inventory kept by Mr. Taylor'." (Vol. II, p. 898.)

"Oh, yes, I show to the yard in my inventory. Yes this summary that Mr. Taylor furnished me shows to the yard, but I do not know that he has sheets for making up the yardage of this. Correct, I checked this against my inventory. And found it absolutely correct. That is right, to the bale, to the yard, and to the bag.

Mr. Thornton. So even if it were not intended as a perpetual inventory as to quantities, it was at least correct, was it not?

A. It was correct as far as other than raw materials; I don't know that it existed for raw materials.

Q. You did not check invoices?

A. Oh, yes, I checked invoices.

Q. And you checked your inventory against invoices?

A. Yes.

Q. And you checked your inventory against this inventory?

A. Yes, if that is an inventory.

Q. *Well, whatever it is, you checked your quantities* against invoices and *against this?*

A. *That is right.*

Q. *And found this correct as to your inventory and as to the invoices?*

A. *That is right.*

The Court. What exhibit number is that you are referring to?

Mr. Thornton. *I am referring to Defendants' Exhibit L."* (Italics ours.) (Vol. II, pp. 920-21.)

It is true that Rosslow, after talking to the accountants for Hyland during the recess, attempted to change his testimony relative to this being a per-

petual inventory. The witness Terkelson, called by the National Liberty Insurance Company, also testified as to Taylor's statements relative to this perpetual inventory on cross-examination by Mr. Schmulowitz:

"Q. But you do remember, don't you, that in the middle of June, or shortly after the 1st of June, there having been a delay in the submission of the June 1st report to you, that Mr. Taylor then stated to you that from that time on he would be in a position to give you at a moment's notice the quantity of merchandise, because he was then preparing a perpetual inventory.

A. That is right.

Q. That is correct, is it not?

A. That is right, yes.

Q. So Mr. Taylor stated to you early in June that he was then preparing a perpetual inventory, which had not previously been in existence; is that correct?

A. No. It may be in substance, it depends on how you interpret it. Mr. Taylor said that the accountants were there, I don't know what firm, but he told me at the time that the accountants were there making up an audit of their books, and that when that was completed he would have a perpetual inventory all fixed so that at any time of the day or on any day that I chose, or if they should happen to have a fire, he could always glance at his books and tell me exactly what the values were at every location that the Hyland Bag Company was interested in." (Vol. VI, pp. 2964-65.)

The witness R. V. Smith, who was the adjuster for some of the insurance companies, and who was

very anxious to find values in excess of $100,000 (Vol. V, p. 2801) saw this inventory shortly after the fire (Vol. V, p. 2799), and was assured by Mr. Taylor that it was very accurate.

> "He told me that he had an inventory that he kept up to date at all times. I asked him if it was a perpetual inventory, and he told me that it was. I told him that I did not have much confidence in any perpetual inventories, and that I would prefer to have a physical inventory, and that we would make arrangements for the physical inventory, and he assured me that his was practically a physical inventory, because he said it was verified quite recently with the physical condition, kept up to date, and when I asked him if they did not take physical inventories, or if they relied on that entirely for the correction of their books or statements, he said, 'Oh, no, we take physical inventories occasionally'." (Vol. V, pp. 2622-23.)

> "And it was with that background of experience that I was prompted to state to Mr. Taylor that I did not have much confidence in perpetual inventories, and Mr. Taylor explained to me that was not a fault with his inventory, that his system had overcome that." (Vol. V, p. 2786.)

> "A. He explained that to me this way, you notice there is a lot of broken stuff up in this mezzanine floor——

> Q. I know there is some broken stuff, but we may differ as to whether it is a lot, or not.

> A. There is a quantity there, and that was the safety valve on his inventory, as he explained to me, any broken lots that was not used up on

that order, instead of going to the basement, it would go back to the mezzanine floor, and then by a check of that they could correct the physical inventory. That is the reason he kept his inventory in such perfect condition, he said." (Vol. V, p. 2787.)

While Smith did not make a copy of that perpetual inventory, he did make a notation of the total shown at the plant, amounting to $88,272.55. This figure was given to him on numerous occasions and was verified to him by Mr. Hyland who obtained it from Mr. Taylor.

"In the office that day when I called Mr. Hyland's attention to the fact that his book inventory or perpetual inventory very nearly proved the correctness of the physical inventory, when it was priced according to his costs—I have here a memorandum of that that I would like to refer to; on the inventory the prices were $86,816.31; and their book inventory or their perpetual inventory, as the figures were finally given to me, were $88,272.55. That figure had been given to me numerous times. This particular memorandum I made on a pad that day in the office while I was talking, during this conversation I have just related. Mr. Hyland said, 'I think you are mistaken about that, the values are $102,000, the book values are $102,000'. I said, 'No, you never had any such value as that, that is built up by the Hood & Strong method of applying the cost of sales'. I said, 'That has nothing to do with the actual merchandise, that is a fictitious value'. I said, 'Your book value, according to your own books, is $88,272.55, and that is predicated on your cost of merchandise'. I said,

'If you would take your inventory and price it correctly your values would be just the same as you would have if you had priced a physical inventory correctly'. He said, 'You are mistaken about that, Mr. Smith'. I said, 'You call Mr. Taylor and he will tell you that is correct'. So he called Mr. Taylor, and Mr. Taylor gave him this figure, and Mr. Hyland repeated it to me, $88,272.55. I just kept this memorandum as a reminder of that conversation.

I wrote it down as he gave it to me right there. I had it before me while we were discussing the loss." (Vol. V, pp. 2757-8.)

This perpetual inventory was also seen by R. B. Radford, who was employed by R. V. Smith and appellant to remove the merchandise from Sacramento Street, and as to whose activities we shall have more to say later.

"* * * I had a conversation with Mr. Taylor, and I believe, Mr. Ledgett, also, and they stated to me that they had on hand a perpetual inventory, or the stock sheets showing them at all times just what merchandise there was on hand, and they went into detail to explain to me how the merchandise was received, and how it was tagged and accounted for. Yes, I did say they informed me that each bag was tagged. Yes, I did find such tags on the various bales." (Vol. V, p. 2505.)

"As to, did I do anything in the way of checking or attempting to check this inventory, well, we did after the inventory, we checked and rechecked it about once a day, I would say at least I rechecked it possibly four or five times. Yes, I

did make 'any check of any kind with any employes of the Hyland Bag Company'. With Mr. Taylor. Mr. Taylor said that it was accurate with this exception, that there were a few bags that could not be accounted for, but did not amount to very much, he did not tell me the number, also that I had some merchandise in my inventory that they did not carry on theirs. He did not point out to me what that merchandise was—he did not point it out to me, but said they did not carry the bale covers on theirs, and possibly some wire in the basement." (Vol. V, pp. 2530-31.)

Mr. Taylor also told Smith he had checked with Radford and the latter's inventory checked with his records.

Warner W. Grove, who was the adjuster for the National Liberty Insurance Company, and not for this appellee, also saw this perpetual inventory and when he found that the actual values at Sacramento Street were below $100,000 he wrote the letter, which is Exhibit 61, denying liability on behalf of the National Liberty. He states:

"We were talking about the question of values, and I wanted to get some idea as to the extent of the stock values; there were preliminary questions I had put without much result, but at the end of the first or the second day I was told that the stock values approximated $90,000. Mr. Taylor told me that. I asked him what evidence he had to indicate that value, and he referred me to what he called a perpetual inventory, and I merely glanced at it and verified the fact that it contained figures of substantially $90,000." (Vol. V, pp. 2876-77.)

The only attempt that we find to contradict these witnesses, or impeach their testimony, is through the witness Taylor, who stated that he did make up a summary, but that it was not until November or December, and that it was made for his own purposes. We find, however, that the adjusters and Radford saw this perpetual inventory within a few days after the fire.

This record disappeared, or at least appellant failed to comply with numerous demands to produce the original. Naturally appellant recognized that it was directly contradictory of and a direct challenge to his claim.

Fortunately L. A. Hart, an accountant called by appellees, saw this perpetual inventory and had the foresight to make a copy of the first three pages summarizing the inventory at Sansome Street, the inventory at Sacramento Street, and the inventory of burlap at Sacramento Street, all as of October 19 and 20, 1929. It is indeed fortunate that Mr. Hart made this copy as otherwise we would have no record of this most important document. Mr. Taylor also impressed upon Mr. Hart the perfection of his perpetual inventory records.

> "A. Mr. Taylor, in response to questions that I asked him in December, 1929, relative to the perpetual inventory sheets, advised me that whenever he had occasion to verify them by physical inventories that there was never more than a bale or so difference between the physical inventory so taken and the perpetual inventory records.

> That is correct, 'the perpetual inventory sheet summary that' I am testifying to is Exhibit BBB, 'which shows the total goods on hand of $88,272.55'." (Vol. IV, pp. 2296-7.)
>
> "Yes, Mr. Taylor told me that his stock, so far as his book figures, never varied more than about a bale." (Vol. IV, p. 2319.)

This summary was introduced in evidence and we do not find in the record a single bit of testimony attempting to prove it incorrect. The first page, Defendants' Exhibit AAA, shows an inventory at Sansome Street as of October 20, 1929, of $63,672.77. (Vol. IV, p. 2290.) The second page, Defendant's Exhibit BBB, shows an inventory at Sacramento Street as of October 20, 1929, of $88,272.55. (Vol. IV, p. 2291.) It will be remembered that this is exactly the same figure as referred to by R. V. Smith. The third sheet, Defendant's Exhibit CCC (Vol. IV, p. 2292), breaks down the first item shown on Exhibit BBB of 331 bales of burlap of a value of $49,-267.78, showing the lot numbers, the type of burlap and the number of bales of each kind on hand on October 19th.

It is also interesting to note that we find in appellant's journal entry number 5007, made after the fire and introduced as Exhibit MM, which shows products on hand on October 19th totalling $88,286.55. This journal entry produced from the records of appellant differs by only $14.00 from the perpetual inventory.

AS TO METHOD ADOPTED BY APPELLANT TO SHOW VALUES AT THE SACRAMENTO STREET PLANT.

It will be noted that none of the figures or exhibits relative to the actual values were introduced by plaintiff, but were fortunately available to appellees due to the fact that certain witnesses had displayed the foresight to note, and in some instances copy, these figures.

Appellant first procured the accounting firm of Hood & Strong to make, under date of November 29, 1929, a report showing a purported inventory at Sacramento Street, as of the date of the fire, amounting to $102,453.23. This report was made up by taking the inventory shown on the books as of December 31, 1928, adding purchases, deducting sales, including an arbitrary percentage of gross profit, and deducting the inventory at Sansome Street. Let us bear in mind that this deduction for inventory at Sansome Street is the same figure as is shown on Defendants' Exhibit AAA. (Vol. IV, p. 2290.) To show the fallacy of such a method, let us assume that the fire had occurred at Sansome Street instead of Sacramento Street. We would have found that by this same method Hood & Strong would have built up the same apparent inventory of $166,126 (Vol. I, p. 248) and that they would have deducted therefrom the inventory at Sacramento Street, amounting to $88,272.55. (Vol. IV, p. 2291.) This would have shown an apparent loss at Sansome Street of $77,-853.45, or $14,180.68 in excess of the amount shown by the actual physical inventory taken after the fire.

Appellant at first accepted this figure of Hood & Strong, and incorporated it in the proofs of loss verified by him and served upon each of the insurance companies. He also adopted the Radford inventory as to lot numbers, description and yardage, placing his own prices thereon, and arriving at an inventory value after the fire of $86,907.98. This left him no alternative except to claim that a portion of his loss, amounting to $15,645.25, was represented by "merchandise totally destroyed". (Vol. I, p. 423.) Prior to preparing and filing this proof of loss, he was notified by R. V. Smith, in the presence of W. W. Grove, that his alleged values were not in accordance with the facts, and that if he filed such proofs of loss he would vitiate his policies.

> "* * * I don't recall who were present on that occasion. I think Mr. Grove was present when this was presented. I believe Mr. Hyland was there on that day. And myself. That is all. Just the four of us, I believe. No, I have not heretofore testified to everything that was said upon that occasion, not to everything that was said upon that occasion. We were together quite a bit then, and I would not attempt to cover everything. Yes, I have given you my best recollection as to the subject-matter that was discussed on that occasion. I think that was the occasion, as I recall it, and I think I so testified that that was the occasion on which I brought up the matter, I told Mr. Hyland the thing that I had told Mr. Sugarman, that it would be necessary for them to file a sworn statement, and they would have to swear to the prices, and that if they swore falsely to these they would vitiate their contract.

> Their attitude at that time was, and they said, they would take all the chances on that. Yes, I have already testified to that." (Vol. V, pp. 2832-3.)

After presentation of these proofs of loss, some of the insurance companies denied liability, others demanded appraisal of the loss.

In June of 1930 appellant served on the various insurance companies another instrument whereby he increased his claim to $76,498.62. Suit was then filed in the Superior Court, claiming this amount of loss. When this suit was transferred to the District Court an amended complaint was filed claiming a loss of $106,992.83. This was predicated upon a second report of Hood & Strong, dated more than a year after the fire, and only two days prior to the filing of the amended complaint. This report was introduced as Plaintiff's Exhibit 2.

It is quite apparent that Hood & Strong were willing to follow the instructions of appellant, and build up any kind of claim which he might desire. As we shall point out later, they were forced to admit in court that other reports were erroneous and that they could give no explanation of the errors incorporated therein.

In making this second report of October 21, 1930, they used one of their employees, Frederick W. Rickards, who had nothing to do with the first report of Hood & Strong. (Vol. III, p. 1161.) This report states:

> "Subsequent to the rendition by us of that statement, an examination by your Auditors,

> Messrs. Lybrand, Ross Bros. & Montgomery, disclosed the fact that the accounts from which our statement of November 29, 1929 was prepared had not been adjusted to conform to values determined by physical count to have been on hand, and it was deemed advisable to have us go into the matter thoroughly in order that an accurate statement could be prepared." (Vol. I, p. 250.)

In this connection it is interesting to note that the facts which they claim were disclosed by Messrs. Lybrand, Ross Bros. & Montgomery, were as a matter of fact prepared by one Parker, formerly with that firm, but during all this time in the employ of Hyland. (Vol. III, p. 1230.) The report then further states:

> "Messrs. Ernst & Ernst, Auditors, in their Report to you dated August 5, 1929, certify to the value of merchandise on hand at May 31, 1929. Using this as a basis, auditing the purchase and sale accounts, and ascertaining the actual cost of the material sold plus direct labor applicable thereto from May 31, 1929 to October 19, 1929 (but without inclusion of factory overhead), we have developed the sum of $132,947.44 as being in our opinion a conservative valuation of the merchandise on hand at No. 243 Sacramento Street, at the close of business October 19, 1929." (Vol. I, p. 250.)

It is also interesting to note that Ernst & Ernst did not make a certified audit, but continually refer to their results as a "balance sheet". (Vol. I, pp. 255 and 260.) As Rosslow says:

> "No, I did not make a complete audit of the books, *I made a balance sheet audit.*" (Italics ours.) (Vol. II, p. 892.)

They made no verification of cash disbursements, or a claim set up under other assets, nor did they make any check of goods in process. "We completely verified by physical count all inventory quantities other than goods in process." (Vol. I, p. 257.)

Hood & Strong start their report of October 21, 1930, by accepting the apparent inventory as shown by Ernst & Ernst in their report under date of August 5, 1929, adding a figure which they claim represents purchases from June 1st to the date of the fire, making certain deductions and arriving at an apparent inventory at Sacramento Street and Sansome Street as of October 19, 1929, amounting to $196,620.21. They then deduct the inventory at Sansome Street (as shown on Defendants' Exhibit A (Vol. IV, p. 2271)), amounting to $63,672.77. From this they arrive at an apparent inventory at Sacramento Street as of the date of the fire of $132,947.44. *In other words, it is necessary for appellant now to claim that goods of the value of $46,039.46 were totally destroyed, obliterated or burned out of sight.*

Let us again examine what the result of adopting this system of arriving at an apparent inventory would have meant if the fire had occurred at Sansome Street. By the same methods, Hood & Strong would have arrived at the same apparent inventory, $196,-620.21, at both locations. We would have found deducted from this the sum of $88,272.55 (as shown on Exhibit BBB, Vol. IV, p. 2291), which would have left an apparent inventory at Sansome Street amounting to $108,347.66. As a matter of fact, we know that the actual inventory at that location was $63,-

672.77. From such a statement appellant would then have argued that there was merchandise of a value of $44,674.89 burned out of sight, totally destroyed or obliterated. As a matter of fact we know that no such values existed at the Sansome Street location.

Incidentally, it is interesting to note Mr. Rickards' attempted correction of the statements contained in Hood & Strong's report of October 21, 1930.

> "My attention being called to the last line on page 1, in the report of October 21, 1930: 'We have developed the sum of $132,947.44 as being, in our opinion, a conservative valuation of the merchandise on hand at 243 Sacramento street at the close of business October 19, 1929.' No, I did not mean by that statement that I certified that there was that much material on hand positively on that date, that was headed 'Statement of apparent inventory'. Yes, this last sentence, to be correct, should have been, 'appearing to be on hand from our examination of the accounts'.
>
> My attention being called to line 3 in our subsequent report of October 13, 1931: 'The value of the burlap, cotton, and twine in bulk and bags on hand at 243 Sacramento street', yes, I make the same qualification with regard to the use of the words 'on hand', in our figures we always use 'apparent' to show that it is not an actual count." (Vol. III, pp. 1231-32.)

As careful accountants, and knowing that this matter was in litigation, in which the insurance companies were claiming that Mr. Hyland was guilty of fraud and false swearing, Hood & Strong made no investigation to ascertain whether or not physical in-

ventories had been taken subsequent to the Ernst & Ernst report. They did not take into consideration the physical inventories at Sansome Street and at Sacramento Street on September 30, 1929. (Vol. III, pp. 1166-67.)

Mr. Rickards did see the inventory taken at Sansome Street on October 15th, only four days before the fire. (Vol. III, p. 1167.) He stated, in reference to the inventory of October 19, 1929:

> "In order to prove that inventory, that was a physical inventory, and in order to prove that inventory we had another physical inventory on October 15, 1929, and *there could not be any better proof of physical inventories than those taken at different dates, that could be reconciled.*" (Italics ours.) Vol. III, p. 1168.)

Whether or not there was an inventory of October 15th at Sacramento Street, we do not know. It is in evidence, however, that there was in existence at that time a physical inventory of September 30, 1929, showing the merchandise contained at Sacramento Street. Although Mr. Rickards considered that there was no better proof of a physical inventory than another one taken at a different date, he made no inquiries as to this other inventory at Sacramento Street. He knew that there was one at Sansome Street, and was either derelict in his duty, or deliberately misstated the facts when he claims he was not familiar with an inventory of the same date at the plant. If there was no better proof as of that date at Sansome Street, why doesn't the same statement apply to Sacramento Street? Why, with the

knowledge that physical inventories had been taken did not Hood & Strong and their employee, Mr. Rickards, hesitate before putting in their report of October 21, 1930? The only answer is that their interest was in building up an apparent inventory larger than that which actually existed at this plant. As we shall later show, included in the purchases which they state were made between June 1, 1929, and October 19, 1929, are goods which were purchased and delivered prior to that date. Although the information was available to them in the form of contracts and invoices, and although they could have checked the dates of the purchases and deliveries of these goods, they did not do so. Again there could be only one answer and that was they were endeavoring to assist appellant in building up an exorbitant claim. Incidentally, the failure to make these checks and the failure to compare their work with the physical inventories of September 30th and October 15th led them into a ridiculous and most embarrassing situation.

In the early part of the trial, and while appellant was on the stand, there was introduced another report of Hood & Strong under date of October 13, 1931, Plaintiff's Exhibit 30. (Vol. I, p. 288.) This developed an apparent inventory of burlap, cotton and twine at Sacramento Street of a value of $124,728.20. This report was prepared by Rickards. (Vol. III, p. 1176.) He was very evasive relative to the data upon which he had prepared this report and could give us no information relative to the method followed by him.

"As to what I did to convert the item of bags into the yardage figures that I have in Column 7 of our report of October 13, 1931, well, it depends on the size of the bag. No, I did not measure to get the data as to the number of yards in the different sized bags, I got that information from the officials of the Hyland Bag Company, the only source of information one has of getting that information. * * * No, I cannot produce that data for you and have not it in our office. As I say, as I told you before, I believe I simply worked it out on a piece of scrap paper and put so many down and threw it away. I do not believe I did retain the figures from which I translated the bags into yards." (Vol. III, p. 1195.)

He admits that there is a discrepancy of 200,000 yards in burlap alone, and yet, taking the figure that he arrives at from yardage and poundage as being the value of the burlap on hand, and adding an item of some $8000, which is included as other materials, we arrive at the same apparent value of merchandise as is set forth in Hood & Strong's report of October 21, 1930. Hood & Strong either carelessly, or otherwise, or believing that the attorney for the insurance companies would not locate these discrepancies, made no attempt to reconcile these reports.

"Yes, the information in Column 7 of the inventory at Sansome Street was obtained from this physical inventory, Defendants' Exhibit J, which I have just looked at. Yes, in our report of October 13, 1931, the figures in this column 7 represent the yardage at Sansome street, both in raw material and in bags. Yes, I notice on

the second page of Defendants' Exhibit J, which purports to be the raw material, in the first column, a lot number. Yes, the second column there are certain 'x's', blue check marks. Yes, the next column under the word 'Quantity' there are numbers indicating the number of bales. That inventory totals 271 bales. And a total yardage of 542,000 yards. Answering your question if I will look at our report I will note I have includ*ing* all raw material and bags, only 465,722 yards, whereas in raw material alone on the very inventory that I said I took this from it shows 542,000 yards, and how do I account for that, I cannot account for that at this moment. As to whether I would say that if there were 542,000 yards of raw material at Sansome street and 136 plus 91 bales of bags besides, that my report correctly shows the amount of yardage at Sansome street, I can't remember the circumstances now, I can't reconcile the two figures, I can offer no explanation. Apparently there is a discrepancy there of some 200,000 yards of burlap. Yes, in arriving at the burlap at Sacramento street, where the fire was, according to the way I figure it in this report of October 13, what I have done is to figure out all the burlap in all locations first. Yes, I note a figure of 1,751,863 yards at the bottom of column 6. Then in order to arrive at what was at Sacramento street I did deduct the amount that I found to be at Sansome street. Yes, if you add 200,000 yards to the figures at Sansome street in order to arrive at the conclusion of what was at Sacramento street on the day of the fire, you would have to deduct that additional 200,000 yards. As to 'that would leave more than 200,000 yards less material at Sacra-

mento street at the day of the fire'—if that were true. I do see the inventory of Sansome street, but this report had to be made according to—you can see the date, October 13, 1931—the court knows what it contains, and we took many short cuts, so I may have also adjusted the bags to some other figure. Answering your question that I cannot say when the raw material alone in the inventory is over 100,000 yards more than I show both in raw material and bags, I cannot give you an answer at this time, not until I can go back into the thing. Answering your question: 'But, Mr. Rickards, using your report, using this figure of 465,000, using your figure, which varies some 200,000 yards or more from the actual inventory taken at Sansome street, your result at the end of your report, this identical report, here, of October 13, 1931, shows on the first page $124,728.20 of burlap on hand with no allowance for the cost of manufacture, and in this schedule that has been added so as to make the exact amount of the material found by you to have been there according to your calculation the exact amount claimed here by plaintiff of $132,947.44; That is the fact, is it not?' That is not the fact. As to what is incorrect about that, this statement, here, that we have on the board, arriving a $132,947.44 was prepared altogether without reference to this statement that you are now cross-examining me on.

Mr. Palmer. I know it was prepared differently, but preparing a statement along these lines with this 200,000 yards error, you still arrived at the same figure.

A. No, we did not arrive at the same figure.

Q. You arrived at a figure of $124,728.20?

A. Which is not $132,947.44.

Q. No, but you explained this morning that the difference between your item and $132,000 was the cost of making the bags which were reflected in your burlap, did you not?

A. And miscellaneous merchandise.

Q. And this brought your figure up to $132,-947.44?

A. There was no attempt made to reconcile the supplementary report with our first report." (Vol. III, pp. 1197-8-9.)

While it is pointed out to him that there is in the report an error of 200,000 yards at Sacramento, he claims that this would in no way affect their apparent figure of $132,947.44. (Vol. III, p. 1200.) He admits that he cannot explain the discrepancy. (Vol. III, p. 1201.) He cannot explain why his report shows only 2414 yards of 40-10 at Sacramento when the inventory taken after the fire shows approximately 96,000 yards of what is supposed to be the same material. (Vol. III, p. 1201.) On cross-examination by Mr. Schmulowitz, he admits that he made a "very stupid error" in this report. Mr. Schmulowitz then asked for leave to withdraw this report and replace it with another. This was denied by the court who stated that plaintiff might file another report. (Vol. III, p. 1215.)

On cross-examination his attention was called to the fact that the total inventory of 37-10 material at both locations on September 30th amounted to 56,000 yards, that there had been no purchases of that material between September 30th and October

19th and yet his report shows that the Hyland Bag Company should have had on hand at the time of the fire 633,968 yards of 37-10 burlap. His only explanation is "I can say as to that, it is evident that the description of burlap on the records of the Hyland Bag Company are in error". (Vol. III, p. 1220.)

He also testifies:

> "Apparently there was not any 37-10 burlap received by Hyland Bag Company subsequent to September 30, 1929, I have gone through these vouchers, they are in chronological order, and I have been informed that there had not been any 37-10 received. I have not seen the paper before you now call to my attention as an inventory of September 30, 1929, at 243 Sacramento street. I notice a lot of descriptive matter missing. I cannot see any 37-10. On the paper which you state is in evidence as an actual physical inventory taken at 1328-1340 Sansome street on September 30, I see here an item, 2199, 37-10, 28 bales, 56,000 yards. I cannot show you any other 37-10 on that inventory." (Vol. III, pp. 1219-20.)
>
> "I made out the report on October 13, 1931. I am willing to admit that is erroneous." (Vol. III, p. 1221.)

Later Mr. Rickards was recalled and another report of Hood & Strong, still under date of October 13, 1931, was introduced as Plaintiff's Exhibit 101. (Vol. III, pp. 1425-31.) This report shows an apparent value of burlap, cotton and twine amounting to $106,643.29. When it was pointed out to him that this differed from their report of October 1930 by

over $26,000, this witness stated "I have made no attempt in any way to reconcile this figure with the other, *it cannot be reconciled with the other.*" (Vol. III, p. 1435.)

He states that he did not go behind the figure of $132,947.44 to determine whether or not over $46,000 was claimed to have been obliterated. (Vol. III, p. 1437.) He also admits that although he had access to all of the books of the Hyland Bag Company, it is impossible to reconcile the figure of $106,000 contained in their latest report with the report of $132,000 shown in their report of October 19, 1930. (Vol. III, p. 1437.)

He further admits that the only way this figure of $132,000 could be maintained would be to increase an item set up on a schedule designated as Schedule No. 1 and exhibited in the court room showing miscellaneous merchandise amounting to $8219.24 by approximately $18,000. (Vol. III, p. 1441.) No evidence was ever introduced to explain this discrepancy. It must also be remembered that this figure of $106,000 was produced by Hood & Strong after Mr. Rickards was thoroughly examined and cross-examined relative to a duplication of $22,552.50. It gives no effect to that duplication, although he admits:

> "* * * Answering your question: if that is true and there is no invoice representing that 300,000 yards, then there is an error in Ernst & Ernst's report, I cannot testify as to Ernst & Ernst's report. Certainly I accepted their figure of $533,631.50 which includes a figure of $22,-

737.12, for which neither I, nor Mr. Rosslow, nor the other accountants have been able to produce or discover any invoice. In their report of yardage and bales dated October 1, 1931, they show an item of 300,123 yards. I could not say there is an apparent error of *300,000* yards in that report, I did not make the inventory of Messrs. Ernst & Ernst. It was certified to by them and I cannot just say what is in it. *I first saw that item of $22,000 odd in a journal entry produced in court by Mr. Rosslow; what it is I don't know.* It purports to represent 300,000 yards of burlap. Yes, the journal entry is marked Defendants' Exhibit M. *That is the first time I saw that. I did ascertain that that amount had been added to make up the $533,631.50.* Since that time I have examined the work sheets showing that until they added on that 300,000 to take up that amount of $22,737.12, their report of yardage was 300,000 37-10 in excess of the bale lot shown in the work sheets. Answering your question 'So that, as far as you have been able to ascertain, there is nothing to show that that 300,000 yards, or that $22,737.12 is correct?' no, I assume no responsibility for the inventory figures of Ernst & Ernst. I took that for granted. Your question as to whether if there is 'that error of over $22,000 on that error of over 300,000 yards, that has naturally been carried forward' into my work, not as an error on my part, but as an error on previous work, is rather hypothetical. If there is an error in the beginning of the inventory, of course the final result will have that same error. I have not been able to identify that $22,737.12 anywhere in the books. I said yesterday that the invoice for a portion

of stock sheet 2199 was dated June 20, indicating that was the date the goods were received, while the invoice for the rest of it is dated, I believe, some time in July or August, if I remember it was dated in August. The invoice of June 20 is only posted one-third to Lot No. 2199, answering your question doesn't that cover the entire 150 bales? The invoice to which I refer is that of June 20, No. 387, representing 300,000 yards of 37-10 burlap ex steamship 'Silver Elm'." (Italics ours.) (Vol. III, pp. 1215, 1216, 1217.)

COMPARISON OF HOOD & STRONG'S INVENTORIES OF NOVEMBER, 1929 AND OCTOBER, 1930.

It is interesting to note that Hood & Strong's report of November 29, 1929, Exhibit 1 (Vol. I, p. 246), arrives at an apparent inventory of $102,453.23. Their apparent inventory arrived at in their report of October 21, 1930, Plaintiff's Exhibit 2 (Vol. I, p. 249), amounts to $132,947.44. This difference amounts to $30,494.21. The reason for this difference arises from the fact that in the first report there are no duplications of purchases, whereas in the second report, due to the manipulation of the records and stubbornness of these accountants in refusing to admit the same when it was shown to them, there is a duplication amounting to $30,462.12. This duplication is only $32.09 less than the amount of increase in apparent values shown by the second Hood & Strong report.

The entire duplication appears in two purchases from H. M. Newhall. The first amounting to $22,-

737.12, represents 300,000 yards of 37-10 burlap included in the Ernst & Ernst report by Rosslow under lot 2199 on the docks as of May 31st purchased from H. M. Newhall, but not at that time entered on the books of Hyland Bag Company. There is an additional purchase of 100,000 yards of 37-10 purchased from H. M. Newhall amounting to $7725. In view of the fact that these two purchases are set up by Hood & Strong in the report of October 13, 1931, at a cost of .08033¢ per yard, we find that the 300,000 yards represents $24,099 and the 100,000 yards represents $8033, the two together totalling $32,132 out of the apparent value of $106,643.29 set forth in that report. In line with our other calculation of adding $8219.24, which is claimed represents other merchandise, although there is not one word of evidence to substantiate this figure, and obtaining our total of $114,863.53 as the apparent value of the entire merchandise, deducting from that the value of 400,000 yards of burlap as figured in that report, we would find an apparent inventory of $82,730.53.

The original report of Hood & Strong, under date of November 29th, shows an apparent inventory of $102,453.23. This report used as a starting basis the book inventory of December 31, 1928. It appears, however, that a physical inventory was taken as of that date which showed that as a matter of fact the books were overstated in the sum of $20,734.89. This over-statement was corrected by a journal entry, number 4601 (Exhibit 159). (Vol. VI, p. 3191.) Hood & Strong, in making up their reports, did not take journal entries into consideration as they claimed

no adjustments on the books affected their reports. (Vol. III, pp. 1233-4.)

This exhibit, Journal Entry 4601 (Plaintiff's Exhibit 159, Vol. VI, p. 3191), however, as set forth in the transcript, is misleading unless the original is examined. On the original the notation "hold until correct amount is ascertained GPT", is noted in lead pencil, and was made by Taylor. The notation "made before physical inventory was priced", was written by Parker. As a matter of fact, it was made during the course of the trial and before this exhibit was offered. (Vol. VI, p. 3218.) There was no explanation of such an entry at the time of offering Exhibit 159, and it was necessary for us to bring this out on cross-examination of Taylor.

Deducting this over-statement of $20,734.89 from the apparent inventory of $102,453.23, we find an actual apparent inventory at the Sacramento Street plant, as of the date of the fire, of $81,718.34. Thus we find that the original Hood & Strong report, when corrected by the over-statement of the inventory of December 31, 1928, and the second Hood & Strong report, when corrected for the duplication of purchases of 37-10 burlap, differ by only $1011.99. We also find that they corroborate Taylor's perpetual inventory.

AS TO DUPLICATION OF PURCHASES INCLUDED IN HOOD & STRONG'S REPORTS OF OCTOBER 21, 1930, IN THEIR REPORT OF OCTOBER 13, AND IN THEIR AMENDED REPORT OF OCTOBER 13, 1931.

The original Hood & Strong yardage report of October 13, 1931 (Exhibit 30, Vol. I, p. 288), shows an apparent inventory of 37-10 burlap amounting to 633,968 yards. Of this amount, 494,000 yards, which is the equivalent of 247 bales, was supposedly at Sacramento Street. After this report was shown to be unescapably erroneous in one item to the extent of $18,085, it was amended, but the apparent total inventory of 37-10 burlap and the apparent inventory of the same material at Sacramento Street was not changed. (Exhibit 101, Vol. III, p. 1425.) *By these two reports Hood & Strong endeavor to do something which appellant could not do and has not attempted to do by any other witness.*

Taylor, who was the regular bookkeeper and accountant for appellant, the man who kept the records and was most thoroughly familiar with them, states:

> "As to having nothing to show what was actually at 243 Sacramento Street on the day of the fire, *I have never been able to work it out satisfactorily.*" (Italics ours.) (Vol. III, p. 1600.)

Taylor could not give us this information despite the fact that he tells us that his record of receipts of merchandise was 99.9% correct (Vol. III, p. 1461) and that it was a fine record, showing the receipts of materials between May 31 and October 19, 1929. In addition to these fine records, Taylor took inventories

every fifteen days at certain locations and every thirty days at others. (Vol. III, pp. 1368-9.)

Appellant has introduced three of these inventories. One of them represents a physical inventory at Sansome Street as of September 30, 1929, showing only 28 bales of 37-10 burlap on hand. These 28 bales appear under lot 2199, which, as we shall show, is a very important number. (Exhibit 98, Vol. III, p. 1393.)

The next is a physical inventory at Sacramento Street as of September 30, 1929, and shows that at that time *there was no burlap of this grade at the plant.* (Exhibit 98, Vol. III, p. 1397.) We also have the uncontradicted testimony of Rickards that no material of this kind was received subsequent to September 30. He ascertained this from an examination of the vouchers and from information given him. (Vol. III, p. 1219.)

The third document was a physical inventory taken at the Sansome Street warehouse on October 15, 1929. (Exhibit 82, Vol. III, p. 1302.) This inventory shows 26 bales of this material at the warehouse on that date under lot number 2199. The inventory taken at this same warehouse on October 21, after the fire, shows that on that date there were still 25 bales of this material in the warehouse under the same lot number. (Exhibit J, Vol. III, p. 1355.) It is quite patent, therefore, that although Hood & Strong undertake to do that which others could not do, and endeavor to show an apparent inventory of 494,000 yards, or 247 bales of 37-10 burlap, *there could not*

possibly have been at the Sacramento Street plant, on the date of the fire, in excess of three bales, or 6,000 yards, of this material.

This naturally calls for an inquiry to ascertain how Hood & Strong can show an apparent inventory of material which the records of appellant shows that he did not have. Incidentally, this leads us directly to at least $30,000 of the overclaim in the proof of loss which appellant, in endeavoring to support the Hood & Strong reports, would have this court believe was burned out of sight.

Going back to Hood & Strong's starting point for their report of October 19, 1930 (Exhibit 2, Vol. I, p. 229), the Ernst & Ernst report of May 31, we find an addition of $22,737.12 "recording material on hand, but not inventoried, at May 31, 1929, lot No. 2199, H. M. Newhall". (Exhibit M.) This sum is included in the total of $533,631.50, which is used as the starting figure by Hood & Strong. (Vol. III, p. 1215.)

Rosslow, the accountant for Ernst & Ernst who prepared this exhibit at the time he was working in the plant in June of 1929, attempted to give a number of lame explanations of this amount, as to the material it represented, and as to where he saw that material. When it was pointed out that the stock sheet number 2199, from which this material took its lot number, showed that it was at pier 41, Rosslow was recalled on rebuttal and stated that he did not remember ever having been at pier 41. He did not remember where he got lot number 2199, or where he saw the mer-

chandise which was recorded under this lot number under Exhibit M. This was despite the fact that it is shown that 13 bales of 37-10 burlap under lot 2199 were on hand when he was making his inventory and were included in the sheets prepared by Taylor and by him given to and checked by Rosslow. (Defendant's Exhibit K, Vol. II, p. 881.) He could not even tell us what locations were represented by this Exhibit K, although it segregates the material as being on the first floor and on the mezzanine, which corresponds with the plan of the building at Sacramento Street, and that it then continues with an account of 115 bales of bagging at pier 11, 75 pounds of liners at pier 21 and 8 bales of 37-10 burlap under lot 2169 at pier 34. This Exhibit then proceeds to inventory other material which is set forth under the heading "locked", which he believes refers to a locked portion of the warehouse.

We find that Rosslow had prepared a summary of the sheets represented in Exhibit K, which was introduced as Defendants' Exhibit L. (Vol. III, p. 1356.)

In arriving at his inventory, which is incorporated in the Ernst & Ernst report on Exhibit L, he adds the sum of $22,737.12, which is designated as "Adj. #20" "Invty on dock". Adjustment number 20 is the portion of Exhibit M which reads, "recording material on hand, but not inventoried at May 31, 1929, lot No. 2199, H. M. Newhall". Pursuant to our demand, appellant then produced Mr. Rosslow's work sheet covering this item. Defendant's Exhibit EE. (Vol. III, p. 1592.) This work sheet is headed "Lot No. 2199,

on dock at May 31, 1929, Except for 23 bales on Sacramento Street ignored in inventory and cost records". This notation is made despite the fact that Exhibit K, prepared by Taylor, showed 13 bales of this material under this lot number. (Vol. II, p. 881.) This work sheet is then stamped "Hyland Bag Company", then there is some computation: 300,000 at 373 pence per hundred, £4662½ at the rate of exchange $4.85, making $22,613.12½, estimated L. C. (landing charges) charges $124, making a total of $22,737.12. Then in lead pencil there is added "Adj. No. 20". There is then added in lead pencil "No. 237 H. M. Newhall". Incidentally, in this respect it is very interesting to note that the entry of pence was originally 372, but has been changed to 373. Taylor had been questioned at length relative to this matter and could give us no explanation. He was invited to produce any invoices supporting this claim. He testified, among other things:

> "Answering your question: from my examination of the invoices which have been produced in court by the Hyland Bag Company, representing purchases of 37-10 burlap from H. M. Newhall & Co., can I tell you any 37-10, other than that referred to on Sheet 2199, that 150 bales representing 300,000 yards, that could possibly have been on hand prior to May 31, 1929; I could not tell." (Vol. III, p. 1514.)
>
> "If I can find any invoice for 300,000 yards of burlap of any kind from H. M. Newhall during the year 1929, except this one invoice representing burlap on the dock on May 31, *I will produce it in court.*" (Italics ours.) (Vol. III, pp. 1627-8.)

Neither he, nor any of the others who had spent many days working on the explanation of this item could produce an invoice, check or other record to support their contentions.

Despite the fact that the lot numbers would run in sequence, and that number 2199 would be the next lot number to be set up, Taylor was so evasive that the court finally stated that this number must have been obtained by Rosslow from the records of appellant.

> "That I don't know, where Mr. Rosslow got the lot number 2199. I could not say that was on the bales. I don't know where he got that—yes, we did have a tin on the bales usually, answering your question as to whether we did not generally have the lot numbers on the bales, but this lot, I don't know where he got it from. I don't know where 2199 came from. He had never been there before, no.
>
> The Court. It is obvious, of course, that there was such a lot number.
>
> A. *It would be the next numeral lot number at that time, yes.*
>
> The Court. He must have gotten it from your records.
>
> Mr. Palmer. In other words, then, what you meant by that last answer, Mr. Taylor, was that 2199 was your next lot number that was to be set up?
>
> A. It would run along in sequence, 2197, 2198, 2199.
>
> I meant I think I saw 2198 on one of the stock sheets. That is the reason I said that. *I believe 2198 was the last one that had been en-*

tered up in our books prior to the time that I prepared those typewritten sheets for Mr. Rosslow. *Yes, the next one would be 2199.* Yes, in some way Mr. Rosslow, at the time he took the inventory on May 31 and the next day, got on that day the lot number 2199. As to 'Even though you had not set it up in your books?'. I don't recollect where it come in." (Italics ours.) (Vol. III, pp. 1488-9.)

Taylor also endeavored to show that this data was made up by Rosslow and that the material could not have been purchased from H. M. Newhall & Co. as their invoices were always in American dollars.

"Yes, those are the sheets that Mr. Rosslow gave me. My attention being directed to Defendants' Exhibit K, and on a sheet which has been numbered 7, the notation at the top in red crayon 'Ten bales out 6/1/29'. I now find the same sheet among the sheets given to me by Mr. Rosslow; I do not find on the sheet handed to me by Mr. Rosslow any notation similar or identical with the notation appearing on Sheet 7, there is no such notation here. There is no such notation on any page of the pages handed to me by Mr. Rosslow. I have not at this time any independent recollection concerning that notation, or any circumstances that might have given rise to that notation.

My attention being directed to Defendants' Exhibit M, which was produced by Mr. Rosslow as one of his work sheets, and particularly to the third item on that page, being 'E. E. Adjustment No. 20, recording material on hand but not inventoried at May 31, 1929, Lot No. 2199, H. M.

Newhall, $22,737.12'. I do not recall seeing Mr. Rosslow making either that entry or any entry similar in character. I do not know from what source Mr. Rosslow got the information that appears to be reflected in that particular entry.

Since the trial of this case started, I have assisted several auditors when they were working upon their investigation of the invoices and records of the Hyland Bag Company, on and prior and subsequent to May 31, 1929, for the purpose of determining whether or not that entry of $22,-737.12 could be identified; I have been requested to assist them.

Mr. Schmulowitz. And have you placed at the disposal of those who have made these requests of you all information and data in the office of the Hyland Bag Company?

A. Everything that I know about.

Q. So far as you know, have you personally been able to find any invoice carrying that precise amount of $22,737.12?

A. No sir; it is just something out of the clear sky, I don't know anything about it." (Vol. III, pp. 1379-80.)

"I recall the form in which invoices were submitted by H. M. Newhall & Co. for burlap purchased from them. As to whether those invoices were rendered in British pounds or in American dollars, always American dollars. As to from what vendors did the Hyland Bag Company purchase merchandise who rendered invoices only in British pounds and not extended into American dollars, from Calcutta; the Calcutta merchants. That would include the Ludlow." (Vol. III, p. 1381.)

Mr. Rickards obligingly took this cue and despite the fact that Rosslow's work sheets showed the yardage, the lot number, the fact that the material had been purchased from H. M. Newhall & Co., was on the dock at May 31st, and had not been entered in the books of Hyland Bag Company, endeavored to justify the fact that they had included this purchase as being one occurring subsequent to the Ernst & Ernst report *because these work sheets showed a purchase in pence and H. M. Newhall & Co. invoices were in dollars.*

> "The Newhall invoices, to the best of my belief, always extended their figures in dollars, which would lead me to conclude that it was not a Newhall invoice or a Newhall record that was seen." (Vol. III, p. 1242.)

This explanation apparently satisfied appellant and his counsel, but unfortunately appellees insisted upon the production of the Newhall contract (Exhibit Z). (Vol. III, p. 1517.) This contract is on the letterhead of H. M. Newhall & Co., Newhall Building, San Francisco, and is numbered 387. It is dated April 3, 1929, and states that H. M. Newhall Company have that day agreed to sell to Hyland Bag Company 300,000 yards of 37" 10 oz. burlap delivered in good order and condition on board the Motorship "Silver Elm" at Calcutta, India, to be shipped to San Francisco, California, on or about April 7, 1929, at 372 pence per 100 yards, C. & F. San Francisco. (Vol. III, p. 1517.) Attached to this contract is a letter of confirmation under date of April 6th confirming the sale

of the same material at a price of 372 pence per 100 yards, plus insurance, cost of letter of credit, state tolls and duty and one pence per 100 yards commission. Here we find why Rosslow first entered on his work sheets 372 pence and later changed it to 373 pence to include the commission.

There is also attached to this exhibit an invoice from George Henderson & Co., of Calcutta, to H. M. Newhall & Co., showing that there was shipped to them on the "Silver Elm", 150 bales of 37" 10 oz. burlap, bearing the marks "India HMN 51 37"10oz./40" Kamarhatty, S.F. 3875/4024. (Vol. III, p. 1322.)

In view of the fact that this court probably is not familiar with the marking of burlap, we desire to state the evidence clearly shows that all burlap is marked by stenciling on the bales. This clearly appears from all the testimony. The figures at the end of this description, 3875/4024, means that this shipment begins with bale number 3875 and includes 150 bales up to and including bale number 4024. These figures represent the range of the shipment. It is undisputed that such markings cannot be duplicated as Taylor says:

> "Q. It is impossible, is it not, to have two sets of burlap carrying exactly the same marking, the same bale numbers, the same quality?
>
> A. *Yes, it is impossible.*" (Italics ours.) (Vol. III, p. 1516.)

Rickards was either absolutely incompetent as an accountant, or he was thoroughly dishonest and would

go to any lengths to support his report to build up the fraudulent claim of the appellant. On cross-examination he stated:

> "Since Mr. Rosslow was on the stand I have discussed with him the question of trying to locate that item of $22,737.12. He said he was not able to identify it against anything in our report. We were unable to locate an invoice representing the amount $22,737.12. Mr. Taylor's part in the matter was small. Mr. Rosslow believed that that amount had not been entered on the books and that was the reason for the correction. Answering your question: if that is true and there is no invoice representing that 300,000 yards, then there is an error in Ernst & Ernst's report, I cannot testify as to Ernst & Ernst's report. Certainly I accepted *their figure of $533,631.50* which *includes* a figure of $22,737.12, for which neither I, nor Mr. Rosslow, nor the other accountants have been able to produce or discover any invoice." (Italics ours.) (Vol. III, p. 1215.)

He further states:

> "Reference has been made this morning to certain Newhall invoices dated June 20, 1929, and August 6, 1929, and I have indicated that I am unable to identify the item involved in that adjustment of $22,000 odd with the amount appearing upon either one of those invoices. *The circumstances that each of those invoices with the dates just indicated is extended in American dollars indicates that there was not any relationship between the data appearing upon those invoices and the data that must have been or that probably was before Mr. Rosslow in connection with that adjustment.* I examined the work sheets of

Mr. Rosslow in which he had 300,000 yards worked out in British pounds to a Sterling figure. *The Newhall invoices, to the best of my belief, always extended their figures in American dollars, which would lead me to conclude that it was not a Newhall invoice or a Newhall record that was seen.* In other words, if I saw a record that was already extended in American dollars, there would have been no occasion for Mr. Rosslow to have made a computation converting British pounds into American dollars. Upon the face of the June 20, 1929, Newhall invoice the extension already appears, 4650 pounds, extended at $4.85 exchange, $22,552.50. On the invoice dated August 6, 1929, the amount appears in American dollars. Also there was a numeral or identifying figure in association with the adjustment of $22,737.12 which I found; on Mr. Rosslow's working paper, on the sheet wherein he worked out the yardage into American dollars, he had a numeral, No. 237, which would appear to refer to some document. Upon ascertaining that numeral, I attempted to ascertain whether there was any invoice among all of the Newhall invoices rendered to the Hyland Bag Company with that numeral 237 upon it. I could not find any Newhall invoice with a number approximately like that." (Italics ours.) (Vol. III, pp. 1242-3.)

And yet with all of this discussion, neither he nor any of the other accountants went to H. M. Newhall & Co. to see if they could get any information, nor did they go to the steamship lines or to the custom house. If they had been making an honest endeavor to present a proper claim they would have made such

an investigation. It will be noted that Rickards, Rosslow and Taylor all stated that this could not be a Newhall invoice, due to the fact that the work sheets, Exhibit EE, were in pounds and that Newhall's invoices were always in dollars. It will be remembered that they also stated that they could not find any amount which would in any way correspond to $22,737.12.

Let us compare Defendant's Exhibit EE (Vol. III, p. 1592) with the Newhall invoice attached to Plaintiff's Exhibit 87. (Vol. III, p. 1320.) We find that Rosslow started to figure this on a basis of 372 pence and, evidently catching the one pence commission, changed it to 373 pence. He figured his rate of exchange at $4.85. To this he added *estimated* L. C. charges of $124, arriving at this total. It will be remembered that Rosslow's instructions were obtained from a letter dated June 5, 1929, Plaintiff's Exhibit 28. (Vol. I, p. 283.) Newhall's invoice was dated June 20, 1929. This accounts for the fact that Rosslow had to estimate the L. C. charges as to which he came very close for we find a difference of only 50¢ between his estimates and the charges which were actually made in the invoice. The rate of exchange used is identical, namely, $4.85. The results arrived at are identical, as far as they go, with the exception that there is an additional 50¢ on the Newhall invoice. We find that Rosslow figures 300,000 yards at 373 pence per hundred to amount to $22,613.12½. Newhall takes the advantage of the extra ½¢ and we find that by adding their charge for 300,000 yards at

372 pence, amounting to $22,552.50 to the fourth item, representing commission, amounting to $60.63, they then add $124.50 for marine insurance as against $124 L. C. charges by Rosslow, making a difference of exactly 50½¢ in the final calculations. The only reason that there is any difference of any kind between these calculations is that Rosslow apparently did not know that of the items of tolls, amounting to $15.32, and of duty, amounting to $1734.38, which are incorporated in the Newhall invoice of June 20th, bringing the total to $24,487.33. (Vol. III, p. 1320.)

Before proceeding with the further discussion of appellant's records, let us call to the court's attention the fact that these are all either on cards or on loose leaves. There could be substitutions at any time. Fortunately for us, however, in the majority of instances we find that the changes were made on the face of the records. We do know, however, that most of the entries were made after the fire, as Taylor has so testified.

> "Yes, I testified that for the last month or two before the fire I hardly touched the books. Yes, by 'books' I include the stock sheets, too. And the ledger, everything pertaining to the books." (Vol. III, pp. 1486-7.)

> "As to this bearing date May 31, but I entered it in October, there have been no entries in the book, at all, between May 31 and October, at the time that I started to work everything was in a chaotic state." (Vol. III, pp. 1524-5.)

We turn now to the stock sheet referred to in Rosslow's working papers, number 2199. (Exhibit

83.) (Vol. III, p. 1306.) We wish that the court would examine the original of this stock sheet, for it has been so altered and added to that the exhibit as set forth in the transcript does not give its full significance. We note that the typewritten date originally placed on this sheet was May, 1929. This date has been changed in lead pencil, admittedly by Taylor, to June 20th. (Vol. III, p. 1464.)

He also entered at the top of the sheet "Rec'd 6/2/29".

> "As to showing you on Plaintiff's Exhibit No. 83 where the information is on that sheet from which I can fix the dates that the goods referred to were received on Sansome or Sacramento street, the steamer 'Silver Elm' is here and May 20 has been scratched out and June 20 written over it, and up here August 6, 1929. I don't know when these goods arrived in the place. That stock sheet appears to contain information from which I could fix the arrival of the goods, yes. I don't know, I couldn't trace that. May 29 originally was written in and scratched out and June 20 in my hand, I saw it at some time and wrote June 20, yes, 1929, and up here, 'Rec'd 6/2/29'. I don't know what that means, but I think the 'Silver Elm' arrived in the harbor about that time. I think about June 1, of 1929, somewhere around there. I am not sure. As to whether the steamer arrived prior to that time, I had no occasion to remember it, recollect it." (Vol. III, pp. 1463-4.)

Even despite these statements of Taylor, we find no attempt to dispute the date of the arrival of the "Silver Elm" which brought these goods to this port.

On stock sheet number 2199 we find identically the same description as in the Henderson invoice represented by the sale of April 3, 1929. (Exhibit Z, Vol. III, p. 1322.) This description is "150 bales 37/10 burlap, 300,000 yards, marked India HMN 51, 3875/4024, Kamarhatty, Ex Steamer 'Silver Elm', Ex Pier 41". The fact that these goods were received on June 2nd, as stated by Taylor, is further evidenced by *this sheet* which *shows that they were used beginning June 3rd.* When stock sheet 559 (Plaintiff's Exhibit 84, Vol. III, p. 1309), was introduced in evidence, the first sheet was missing. Taylor either found that missing page, or reproduced it, and it was introduced as Plaintiff's Exhibit 158. (Vol. VI, p. 3186.) This sheet shows that 22 bales of this material had been made into bags on June 4th.

Incidentally, it will be noted that two other entries on the front side of the sheet are erased, and that there have been changes under the title "used". This is very important as there have been additions to this card and a deliberate attempt to confuse this burlap with other material that was received under stock sheets numbered 2187 and 2200. In the same way there has been entered on the carbon copy of the voucher in payment of this invoice, figures in red ink indicating that the invoice and voucher covered not only stock sheet 2199, but also stock sheets 2187 and 2182. We do not know when these red ink entries were made, but the brazenness of appellant and his employees can be more readily appreciated when we realize that this voucher is dated July 27, 1929, and these figures purport to segregate this material to

other lot numbers, which, according to the testimony of appellant's witnesses, were not purchased until after the date of the voucher. We proved by the testimony of Almer Newhall, and by the delivery order of H. M. Newhall & Co. (Defendant's Exhibit PP, Vol. IV, p. 2091), that the "Silver Elm" arrived at Pier 41 in San Francisco on May 25, 1929, carrying this 150 bales of 37-10 burlap, and that on May 31st the General Steamship Corporation was directed to deliver the same to Hyland Bag Company. We then turn to stock sheet 2187. (Exhibit U, Vol. III, p. 1238.) An examination of this stock sheet shows that not only are appellant's contentions relative to it untrue, but that this stock sheet has also been changed. It was originally dated April, but this was erased and the date of June substituted. This stock sheet called for 50 bales of the same type of material, namely, 37-10 burlap, but we find that the markings are entirely different. This burlap is marked "India L83 MA HMN 1/25", and "India L83 IA HMN 1/25". There is also a change, in that there has been other writing scratched out, namely, "their burlap warehoused for them". We shall deal with this later.

Appellant was careful not to fill in any contract number, steamer or pier on this stock sheet. Twenty-five bales of this burlap, being those marked "L83 HMN MA 1/25", arrived on the SS. "President Jefferson", on April 17, 1929, as is shown by Newhall's invoice attached to Plaintiff's Exhibit 88 (Vol. III, p.1324), while this invoice is dated August 6th and purports to complete a sale of August 2nd.

The records of the Dollar Steamship Company, as shown by a letter which was introduced in evidence under stipulation, shows that 50 bales were delivered to Hyland Bag Company, under orders from H. M. Newhall & Co. on April 25 and 26, 1929. (Vol. IV, p. 2095.) We shall show later that as a matter of fact the invoice of August 6th, covering this material, and the fact that this stock sheet shows that it was merchandise of Newhall warehoused for their account, was the result of appellant's dealings with Colbert, an employee of Newhall. We have already pointed out that these stock sheets are numbered chronologically, which would have put stock sheet 2199 in May, the date it originally bore. It is interesting to note that the goods represented by stock sheets 2184, 2185, 2186, arrived on the same steamer with the goods represented by 2187. Naturally, appellant could not permit the date of May to remain on stock sheet 2199, and the date of April on the stock sheet 2187 and still claim that these goods were not in San Francisco when Rosslow was doing his work, when they were included as later purchases by Hood & Strong.

According to stock sheet 2187 the material was made into bags on June 20th. Plaintiff's Exhibit 158, showing production of bags, shows, however, that the entire 50 bales represented by stock sheet 2187 had actually been made into bags on June 10th.

As a matter of fact, these goods represented by stock sheet 2187 were actually sold by H. M. Newhall & Co. to appellant under Newhall contract 9486,

under date of December 1, 1928. That contract was filled by deliveries from the "President Jefferson" of 50 bales, and "President Jackson" of 50 bales, under Newhall delivery orders 310 and 426. They were originally sold at 8.17¢ per yard.

The merchandise represented by stock sheet 2200, (Plaintiff's Exhibit 96) (Vol. III, p. 1384) consisted of 50 bales of 37-10 burlap, 100,000 yards marked "L-83 HMN SF 5/100," and arrived on the S. S. "President Jackson." This vessel arrived in San Francisco on May 29th and the entire 50 bales were delivered to appellant on June 4th, 5th and 6th. (Vol. IV, p. 2094.)

According to Plaintiff's Exhibit 158, the entire 50 bales was made into bags on June 8th. They were delivered to Hyland under Newhall's delivery order 426. (Vol. IV, p. 2091.) After the arrival of the 200,000 yards of material represented by these stock sheets, and after they had been actually converted into bags by appellant, Colbert, an employee of Newhall, to whom we shall later refer, cancelled this contract under date of June 20, 1929. Under date of August 6th a new invoice was made by Colbert, reducing the price from 8.17¢ per yard to 7.72½¢ per yard, and apparently setting up as a sale on August 2, 1929, goods which had actually been sold in December of 1928 at a higher price, and which had actually been converted into bags by appellant two months before the purported sale. This invoice also purports to be covered by Haslett Field Rec. F10259. Newhall could find in their records no copy of any

such receipt. It appears that as a matter of fact there were 100 bales of some kind of burlap in the Haslett Warehouse under such a receipt, but they were withdrawn on July 24th, 26th and August 2nd. (We have summarized this transaction which is set forth at length in the testimony of Almer M. Newhall in Vol. IV, pp. 2096-2102.)

We then produced Newhall's records showing that there were no purchases of 37-10 burlap in 1929, except the 300,000 yards shown by the invoice of June 20th, 350,000 yards shown by invoice of July 27th and 200,000 yards shown by the invoice of August 6th. Also there were no purchases of burlap of any kind from Newhall between January 1st and June 1st. The transcript of these records was introduced in evidence as Defendants' Exhibit NN. (Vol. IV, p. 2081.) The item of 350,000 yards, consisting of 175 bales, arrived on July 20, 1929, and is properly included in purchases after the date of Ernst & Ernst's inventory. (Vol. IV, pp. 2086-7.)

Rosslow stated he never gave his figures to Hood & Strong. He was forced to admit that anyone following Hood & Strong's method, without his data, would make an error of $22,737.12. (Vol. II, p. 917.)

> "With reference to Defendants' Exhibit EE, I cannot tell you where I got those figures of 300,000 yards and 373 pence. I cannot recall whether I saw Defendants' Exhibit Z or not, I know that I looked at some of these contracts. I could not say whether I saw this one having 372 pence per hunderd yards and 1 pence per hundred yards commission, or not. I cannot recall

where I got that information 'that these goods on the dock which had not been inventoried were lot 2199.' I am quite sure it was furnished by Mr. Taylor, either verbally or he handed me something that he had made up. I can't recall whether I saw stock sheet 2199 then, or not. *I must have had some evidence on which to base my figures of $22,737.12 adjustment. I cannot tell you where they came from.* As to where I got the information that this burlap was from H. M. Newhall, it would have been from the same source, but I could not tell whether it was written or the nature of the document. In the course of my audit I certainly would see invoices dated after the 1st of June. My audit continued for some time. As to Exhibit No. 88, an invoice dated June 20th, from H. M. Newhall, I could not say if I had seen that invoice before. Yes, you call my attention to the extension of pounds into dollars, amounting to $22,552 and some cents. There is also an item of commissions $60.63. Those two items do indicate the same amount in dollars that I arrived at by multiplying by 373 pence per hundred yards. Then I estimated $1.24 for letter of credit service, yes. That is the way I arrived at $32,737.12, yes. Or 12½ or 13 cents if the other way, yes.

Examining that contract and the invoice and my work sheet with the view of refreshing my memory as to whether that is the burlap that I found on the wharf at that time, I have nothing in mind other than what appears in my work sheet, and there is nothing there that I can definitely say that could be tied in with this invoice. I made no investigation since, to endeavor to ascertain whether that is the burlap that is rep-

resented by the invoice of June 20, although I have looked over my papers to see if there could be anything besides this one sheet of paper that might lead to something. I don't know what that figure 237 was. It is evidently a number, it is preceded by a number sign. No, I have no idea of what that could refer to. Yes, I did actually find that burlap on the docks at that time, with the exception of some bales that I found at 243 Sacramento street. I do not remember what dock that was. I can't remember now whether it was Pier 41. I have nothing in my work sheets to show that. I can't recall having found or having seen the invoice, itself, representing these particular goods for which I made the adjustment of $22,737.12. I can't recall whether I have seen this invoice of June 20 covering 37-10 burlap, H. M. Newhall, before, or not, I have seen many similar ones. I cannot possibly remember after two years whether I have seen any invoice of H. M. Newhall covering 37-10 burlap. No, I have no recollection of it. No, I have not been making some investigation during the last month, none other than, as I said, looking through my papers to see if I could get anything besides this. No, I have not been at the Hyland Bag Company working on papers. I went up there to talk to Mr. Parker once. Yes, concerning this particular item, it was in that connection that I looked through the papers, we wanted to see if there could not be something besides that 237, or any reference to this 237, or any other thing that could lead to it. *Yes, if that is the only burlap from H. M. Newhall & Co. sold or delivered to the Hyland Bag Company*

between January 1, 1929, and June 20, 1929, I would think that is the burlap that is represented by that invoice and that contract." (Italics ours.) (Vol. IV, pp. 1715-16-17.)

"If a person had not seen my work sheet and all they were furnished was $533,631.50, an extract of my report showing that inventory, there would not be anything to call their attention to that $22,737.12, not unless they went further and reconciled the figures of $533,631.50. You would have to go back and reconcile it, as I said, the book figures to the $533,631.50, and then carry on. Subsequent to May 31, and prior to the time that I came out to Court to testify, no one asked me for the work papers, personally. I am positive that those work papers were never furnished to Hood & Strong." (Vol. IV, p. 1720.)

In this respect it is interesting to note that Rosslow was instructed to produce the records of Ernst & Ernst showing the dates on which he did his work at Hyland Bag Company. It appears that his inventory pricing and checking was done on the 17th, 18th and 19th of June, after lots 2199 and 2187 were received by Hyland, and before the invoices were received from Newhall. (Vol. IV, p. 1722.)

Despite the testimony that we have shown, and despite Mr. Schmulowitz' doubt as to this item, appellant endeavored, on rebuttal, to prove that, as a matter of fact, the inventory of December 31, 1928, was not less than the book inventory of that date. As we have shown, appellant's journal entry number 4601 (Vol. VI, p. 3191), recognized that fact

and made that deduction. On rebuttal the inventory of December 31, 1928, was introduced. (Exhibit 160, Vol. VI, p. 3194.) We wish that the court would examine the original of this exhibit in following our statements relative to it, the additions made to this inventory and the ease with which such changes could be made.

The first page of this inventory shows bales of burlap, giving the lot number, number of bales and description of the material. The total of $115,145.64 appears in red ink. At the foot of the page, and below the red ink totals, we find added Lot No. X01, 34 bales 37-10 buralp $5425.29; lot No. X02, 104 bales 37-10 burlap $17,467.83. These two items total $22,-893.12. In this connection the court should note that it is necessary not only to wipe out this discrepancy between the book inventory and the physical inventory as of December 31, 1928, but that it is also necessary to build up the apparent inventory of one particular grade of burlap, namely, 37-10. This was necessary not only to show that there was no duplication by Hood & Strong, but to attempt to substantiate their so-called yardage and poundage inventory of October 13, 1931. (Exhibit 30, Vol. I, p. 288 and Exhibit 101, Vol. III, p. 1425.)

We have already shown that the material added at the bottom of the page of the inventory, namely, lots X01 and X02, represented 138 bales of this material. Attached to this inventory we find a recapitulation sheet. The center column of this sheet starts with a credit of $116,105.25. This total is the red

ink original total of the first page of the inventory, giving effect to an adjustment of $959.61—as shown on that page. The total as it now appears on that first page—obtained by subsequently adding X01 and X02, does not appear on the recapitulation sheet. On this sheet we find a total, in fact two totals, as it will be noted that there are several figures scratched out and changes made. One of these, representing the deduction of $20,734.89 set up in Journal Entry 4601 (Plaintiff's Exhibit 159) is, as a matter of fact, definitely tied in to the journal entry by the notation "J. E." where the amount is deducted from $31,-546.26 which was originally set up opposite item 25-13, and changed as the result of the deduction of this journal entry to $10,811.37. The total shown on that page was originally $178,473.35, from which was deducted the amount of the journal entry, leaving a total apparent inventory of $157,738.46. These totals do not include X01 or X02 put down below, and we do not know when this was done, nor do we know when X01 or X02 were added to page 1 after it had been totalled. We also find another addition, including this sum of $22,893.12. We also find an addition showing how this sum was obtained. It will be noted that the figures $5425.29 and $17,467.83 correspond with the additions to the first page of the inventory representing X01 and X02, respectively.

We then find, under date of February 28, 1929, that Journal Entry No. 4715 was made crediting R. C. Hyland Investment Account with $11,056.16. (Defendants' Exhibit FFF, Vol. V, p. 2383.) Under

date of March 31, 1929, Mr. Taylor then set up Journal Entry No. 4752 (Defendants' Exhibit GGG, Vol. V, p. 2583), crediting R. C. Hyland Inv. Acct. $3498.36. There is attached to this "Explanatory, stores used in manufacturing during March 1929". Taylor admits that Journal Entry No. 4715, amounting to $11,056.16, represented 67 bales on stock sheet X02 and that Journal Entry No. 4752, amounting to $3498.36, represented 21 bales on the same stock sheet, making a total of 88 bales, or $14,554.52. He also admits that he had already adjusted his inventory as of December 31, 1928. He does not remember when these entries were actually made, but admits

> "They might have been a little bit later than the month they bear date." (Vol. IV, p. 1810.)

We then get a further very interesting admission from him.

> "I don't know without going into it, I could not answer that. As to whether I had to increase my books over $20,000 to make my books correspond with my physical inventory, that is something I could not state off-hand, what the entry was, or what I did, that is going back a long time. I don't know now whether in February and March I increased my inventory, apparent inventory, by $14,554.52, that is going back a long time, I don't know now how I adjusted, what the detail of the 1928 adjustment was. I don't remember the detail, the books will show that.
>
> Yes, referring to Stock Sheet X02, that stock sheet is the year 1928. Yes, and represents bur-

lap made into bags in 1928, it should have been, yes. 521 is my number for bags in 1928. Correct, bags made in 1929 bear the number 559." (Vol. IV, pp. 1811-12.)

Referring to stock sheet X02 (Defendants' Exhibit KK, Vol. IV, p. 1812), we find that as a matter of fact that was a stock sheet for the year 1928. According to Taylor's admission the manufacturing number 521 refers to bags manufactured in that year, whereas bags made in 1929 bore the manufacturing number 559, a stock sheet which has already been referred to.

Stock sheet X02 shows on its face "year 1928". It also shows that the bales of burlap represented on that sheet were a monthly balance from 1927 carried over and used in February; that they were not, as a matter of fact, a balance carried over from 1928 to 1929. We find that the first seven items are totalled, showing 67 bales of a value of $11,056.16, corresponding with the credit set up to Richard Hyland Investment Account by journal entry 4715. (Exhibit FFF, Vol. V, p. 2383.)

On the left we notice the notation that it was used in February in making bags under the manufacturing number which Taylor states represents burlap made into bags in 1928, namely, number 521. Following this we find other burlap used under the same manufacturing number with a notation on the left "21 used Feby.", and on the right, opposite the third and fourth items, we find the notation "J. E. Feb. 1929". As we have already pointed out, Taylor admits that

this makes up the total of $3498.36 credited to Hyland's account by journal entry 4752. (Defendants' Exhibit GGG, Vol. V, p. 2383.)

Below, under the heading "used", we find that the 67 bales having a value of $11,056.16, were made into bags on January 31; and that the 21 bales, having a value of $3498.36, were made into bags on February 28. The sheet is marked "completed". (Vol. IV, p. 1813.)

As a matter of fact, the error in Hood & Strong's report is greater in regard to the 300,000 yards, as they figure it at .08033¢ per yard, amounting to $24,-099. In addition to that there is the other duplication which we have pointed out, of the 100,000 yards amounting to $8033, making a total error of $32,132. On the other hand, Rickards tells us that Rosslow undoubtedly made an error in making this adjustment. He states that a cancelled check would have been the best evidence of a purchase, that the record of the checks was complete, but that there was no check to H. M. Newhall. That, therefore, Rosslow must have made an error and there was no justification for this amount of $22,737.12. No wonder that Mr. Schmulowitz, who was at that time the attorney for appellant, stated:

> "Mr. Palmer indicates that the figures presented by the accountants produced by the plaintiff, except for the one issuable item arising out of the Rosslow report, or the Ernst & Ernst report, of $22,000, in connection with which I may frankly state to your Honor I am in doubt personally at the present time." (This quotation is

from Vol. 13, p. 1154 of the reporter's typewritten transcript and was omitted from the printed transcript.)

At another time Mr. Schmulowitz states:

> "I want to say in that respect, your Honor, that we have sought to place before the Court everything that we can possibly find that is pertinent to that particular item. Upon that basis I think Mr. Rickards has testified that he is satisfied personally that the additions of purchases are not a duplication of that item, but that he cannot determine from the Rosslow data exactly what Mr. Rosslow had in mind when he included that item as part of that $533,631.50. *That is the reason I say that until it is possible to tie it in, or until it is possible to demonstrate that there is a duplication, there is doubt as to that item.*" (Italics ours.) (Vol. III, p. 1581.)

Appellant had produced as Exhibit 84, stock sheet 559, which, as we have previously shown, represented goods manufactured in 1929. Mr. Taylor either found the original sheet, or as he says, reproduced it. This was introduced on rebuttal as Plaintiff's Exhibit 158. (Vol. VI, p. 3180.) In order to bolster up the claim and prove that there was actually 37-10 burlap on hand, two items had been entered at the bottom of the second page. These were out of order chronologically, and were apparently an afterthought. One of them was in lead pencil, supposedly representing 37-10 burlap, set up under lot X02, of a value of $8338.68. This was never set up on the books and was, as a matter of fact, added to these sheets after the fire, and after

the filing of the proofs of loss. The cross-examination of Mr. Taylor in this respect is very interesting.

"Plaintiff's Exhibit No. 158 is the preceding part of the sheet which Messrs. Cerf & Cooper did not have available in this written-up form when they examined the books. I have produced only the first sheet because I presume they made a copy of the other sheet; they had it in front of them and used it in the office for several days. X02 appears on that. It does on the other sheet, also; it does in the amount, I think, of $8000—$8338.60. In regard to that, yes, *I was examined at the time I was previously on the stand; as to 559. As to why I did not produce the entire sheet at that time in connection with Plaintiff's Exhibit 84, which also represented the 559, that is correct.* Since that time I have made up this sheet, I made it up in an hour, went right over the records and made it up; they did not make it up, so I made it up for them.

Mr. Thornton. Q. In regard to the second sheet of this, after August, you go back to somewhere in June and set forth in lead pencil X02——

A. I have it right here.

Q. Let us see it.

A. Yes. Let me give you the key to this.

Q. I think I have the key to it.

A. You have?

Q. I think so. In other words, the second sheet which you are now producing runs along with entries, the last entries being August 1, 6 and August 1; is that correct?

A. Yes.

Q. Then later 2199 is added under date of July 23: Is that correct?

A. Yes.

Q. And in lead pencil X02 is added under date of June 20—all of these appear in lead pencil, but give no date except June blank?

A. June blank.

Yes, that was added by me sometime after the completion of the stock sheet as it stood. I did not discover that until some time after the fire—along about that time, I think somewhere around in there. That has been there for a long time. It would have to be, because I would have no way of getting the number of bags made unless the material was all on that sheet. *This figure of 2199 and July 23 and X02 under June were added after the proofs of loss were filed, yes, surely. Yes, somewhere in 1930.*" (Italics ours.) (Vol. VI, pp. 3213-14.)

AS TO APPELLANT'S EVIDENCE AS TO THE AMOUNT OF LOSS OR DAMAGE.

This evidence is well summed up on page 31 of appellant's brief.

> "Plaintiff testified that he noticed what he would judge a lot of ashes after the fire. (V. I, p. 471.) It appears from the testimony of disinterested witnesses that a great deal of debris was removed following the fire. (V. VI, pp. 3050 to 3060; V. II, pp. 767-8.) There was some out of sight loss as the court finds." (V. I, p. 185.)

This is disputed by every witness produced by appellees who had been on the premises after the fire. We shall not unduly enlarge this brief by quoting the testimony of the adjusters, of the men of the Under-

writers' Patrol, who were there to protect the property, or the firemen. We shall refer to Mr. Radford, and his inventory, later.

The only other method of attempting to prove damage is by deducting from the figures of Hood & Strong's apparent inventories the amount of the Radford inventory.

We have already shown that the Hood & Strong apparent inventories are erroneous, and that they do not prove or tend to prove that there was any merchandise damaged or burned out of sight. In addition we shall show that the inventory taken after the fire absolutely corroborates this statement.

While the burden was on the appellant to prove his loss, the attitude throughout the trial was that the burden was upon the insurance companies to disprove it. There is not one word of evidence in the entire record to indicate what, if any, merchandise was damaged.

Appellant employed one Ben Sugarman as his adjuster. Sugarman, of course, was vitally interested in building up a large loss as his compensation was based on a percentage of the recovery. (Vol. II, p. 1008.) Yet Sugarman could give us no information to substantiate the fact that any merchandise was destroyed, obliterated or burned out of sight.

> "I did not tell the adjuster or Mr. R. V. Smith that the out-of-sight was my ace-in-the-hole. *As to R. V. Smith telling me in his opinion nothing was burned out of sight, I do not think I put it down to any definite amount; I told him*

there must be an out of sight there. I do not know what was burned out of sight. I endeavored to ascertain by the Hood & Strong statement. Yes, in answer to your question 'you took the Hood & Strong statement setting a value of $102,-000, you took the value set forth in the schedule attached to the proof of loss, and arrived at the opinion that the difference between them represented something that must have been burned out of sight'. Not having been in the premises at any time before the fire I could not tell you what was missing there. *I did not endeavor to ascertain what was burned out of sight.*" (Italics ours.) (Vol. II, pp. 1024-25.)

Taylor could not give us this information.

"* * * As to having nothing *to show what was actually at 243 Sacramento street on the day of the fire, I have never been able to work it out satisfactorily.* As to can I tell you at the present time the description of any bags that were destroyed in the fire, there must have been bean bags destroyed. There should have been bean bags in the plant at 243 Sacramento street on the day of the fire. I do not know whether or not there were any. I don't recollect. I did not see them physically, but, according to all the records, they should be there. No, I don't know where they should have been in the plant. I don't know whether they were finished or were in process, but I would say they were in process, but I don't know what state they were in. I don't know what floor they would have been on." (Italics ours.) (Vol. III, p. 1600.)

He further states:

> *"I cannot determine from the stock sheets what was in that plant in either burlap or bags on the day of the fire."* (Italics ours.) (Vol. III, p. 1601.)

He further states :

> "No, *I cannot 'explain that $46,000 burned out of sight',* not now. If I went into it full I probably could." (Italics ours.) (Vol. III, p. 1604.)

We now come to the question of debris. Mr. Ledgett, Mr. Hudson, and other witnesses, testified that this was removed under the direction of Radford. Both Radford and Smith testify that no merchandise, with the exception of one load, was removed, except under Radford's direction, to the warehouse on Green Street, and that this one load was removed by Sugarman and returned to Green Street. They also state that there was no debris of merchandise, that all of the merchandise not only could be, but was, identified and moved to Green Street. Appellant produced a scavenger, one Baldocchi, who testified that there were seven loads taken out of this plant. He testifies:

> "* * * I do not keep a notation of what I put on these trucks, no, I keep track of the loads. No, I do not keep any record of what goes in them. Or of the weight, or the quantity, no." (Vol. VI, p. 3052.)
>
> "The Court. Q. When you say you hauled seven loads was it from any particular part of the building?

A. No, it all taken out from that ground floor on the back and the sidewalk, I never went upstairs.

Q. You made a contract to do what: to clean the building, or clean a certain part of it?

A. I gave a price of $70, and after the job was done we figured up and found we lost money.

Q. I want to find out whether you cleaned the whole building, or part of it.

A. We cleaned all the stuff that was on the sidewalk, and inside of the building on the ground floor.

Q. You did not clean any of the upper floors?

A. No, we didn't do anything with the upper floors?

Q. You cleaned the ground floor?

A. Yes.

Q. The basement?

A. Not the basement.

Q. Just the ground floor?

A. There must have been a lot that they brought down, they were bringing a lot of stuff down." (Vol. VI, p. 3053.)

"A. I don't know whether it was brought down, I didn't see them bring it down. There was a big pile off the main floor in the back, and there was a whole lot of canned stuff on the sidewalk." (Vol. VI, p. 3054.)

"A. I will tell you, all I know is to make seven loads there must have been a lot of stuff there." (Vol. VI, p. 3059.)

Prior to this man's taking the stand, the appellant had called one of his employees, a man named Hudson.

"Now, about removing this debris, as to whether we could clean up a floor and then remove the debris afterwards, Mr. Ledgett would tell us that Mr. Radford said we could move this or move that, and we would go up and clean it out. Oh, no, that was not after we removed all the merchandise, it was before. Yes, sir, that was before. I don't know how many days it was after the fire when we started moving this debris.

Mr. Thornton. Did you remove the ten loads in the Kleiber truck and the seven or eight that the garbage man took away before you started moving this merchandise to Green street?

A. We hauled the stuff out to the dumps before that, yes; and the garbage man, I believe was before that, too; I would not say for sure.

Q. Was Mr. Radford there when you were hauling that away?

A. Yes, sir.

Q. *But that was all before you started moving anything to Green Street?*

A. *Yes, sir.*

Q. And that was all gathered up under the direction of Mr. Radford?

A. Yes, sir.

Q. And he would tell Mr. Ledgett to tell you to take it away?

A. Yes, sir.

Q. This stuff that was taken away by the scavengers, do you remember when that was taken?

A. No, sir." (Italics ours.) (Vol. II, pp. 742-3.)

"Q. *A large part of it was sawdust and shavings, was it not?*

A. *Not all of it.*

Q. *A large part of it was?*

A. *Yes, sir.*

Q. *The bulk of it was?*

A. *I believe so.*

Q. Did Mr. Sugarman tell you to haul some stuff away before Radford gave you any instructions?

A. No, sir.

Q. Did Mr. Ledgett tell you to haul away some burlap that was on the floor, there?

A. *There was nothing moved until Mr. Radford told us to.*

Q. *There was nothing moved until Mr. Radford told you to?*

A. *No, sir.*

Q. *You are positive of that?*

A. *Yes, sir.*" (Italics ours.) (Vol. II, p. 744.)

There was consistent contention throughout the trial that despite this testimony there was over 100 tons of debris removed. To show plainly the fallacy and fraud in this connection, let us figure what 100 tons of debris would mean. One hundred short tons would amount to 200,000 pounds. According to the testimony, 40" 8 oz. material weighs 8 ounces, or ½ pound to the yard. We shall take this as an illustration, although this material is much heavier than cotton, and much heavier than the average material shown in the inventory. The inventory shows only 117,797 yards of 40-8. There are only 29,767 yards of material heavier than 40-8 and 260,286 lighter than 40-8. The claim is so ridiculous that we are willing to take a figure much heavier than the average. Using

40-8 as our illustration, it would mean that 200,000 pounds would represent 400,000 yards of this material. On the cross-examination of Ben Sugarman there was introduced Defendants' Exhibit P. (Vol. II, p. 1007.) While this is not set forth in full in the transcript, it is sufficiently summarized. The percentages of damage set forth in this exhibit were used in figuring the damage to the various items in the schedule attached to the proofs of loss. The numbers of the items in Exhibit P correspond to the number of the items in the schedule attached to the proof of loss. In this schedule are shown many thousands of yards of material claimed to have been damaged 90%, yet this material is not classed as debris. As a matter of fact, it was salvaged and it was possible to identify the quality of the material and number of yards. It is therefore fair to assume that any material which would be classed as debris must have been damaged in excess of 90%. We shall, however, use the 90% as a working basis as we again desire to make our contention as obvious as possible, giving the appellant the benefit of every doubt. If this so-called debris was 90% destroyed there would be only 10% remaining. 400,000 yards therefore must have represented only 10% of the original material. On this basis 100 tons of debris would have represented 4,000,000 yards, or 2000 bales, using 40-8 as our standard. Using appellant's values for 40-8, as set forth in his schedule, we would find that the value of this 4,000,000 yards would be $320,000, and yet the highest claim we have for value at this plant was $132,000, of which in excess of $86,000 is accounted for.

In order to show further the type of testimony upon which appellant relies, let us illustrate what 2000 bales would mean. We made a demonstration relative to Mr. Hyland's contention concerning the stock on the second floor. In demonstrating his contention we had an extra model of this floor eliminating all machinery and anything else that would necessitate a deduction from the amount of floor space. We placed 150 bales on this second floor. These 150 bales more than covered the entire area, including that which we know was occupied by machines. We shall, however, again give the appellant the benefit of any doubt in this argument, and take 150 bales as an illustration. There were four floors to this building. Taking 150 bales to the floor, if placed singly and covering every inch of space, we would find that the fourth floor would accommodate 600 bales. In order to put in 2000 bales we would have had to cover each of these floors completely three and a third times. In other words, to put into this building merchandise representing 1000 tons of debris it would have been necessary to cover the four floors solidly to the depth of seven and a half feet (using the size of the bales as shown on our model list (Exhibit KKK, Vol. V, p. 2438), which is undisputed) leaving no space for the machinery or for the merchandise that was inventoried after the fire.

Perhaps an even better illustration would be in line with our Exhibit JJJ. This was the exhibit representing the second floor in accordance with Mr. Hyland's testimony as to its contents. While we do not

know whether or not the models representing merchandise are still in position in this model of the second floor, we have in evidence photographs showing the result of attempting to place this merchandise on that floor. An examination of these photographs will show the court that it not only blocked all doors and windows, covered all space occupied by machinery, but it projected above the height of the walls. 2000 bales of burlap would have filled two floors to the same extent after removing all machinery and the stock which was later found in the building and inventoried. These illustrations will probably give the court a better idea of the meaning of this claim relative to debris.

We would also like to know why, if there was any debris representing merchandise, Mr. Hyland's expert, Mr. Sugarman, was not informed of it, and why we have no testimony from him relative to debris and as to merchandise represented by it. We would also like to know why no attempt has been made to show either the trial court or this court what that merchandise was. We would also like to know why it was not called to the attention of insurance adjusters who were there to determine Mr. Hyland's loss.

Fire Chief O'Neil testified that burlap is not inflammable, and that he had had experience with it in a number of fires. He testified relative to the fire at the Pacific Bag Company where the entire building had collapsed and yet they could identify the burlap, although streams of water had been played on this for days.

Mr. Logie, who had years of experience in the burlap business, and also had experience with fires in burlap, stated that it was not subject to spontaneous combustion, not readily inflammable and that a building such as the Hyland plant would burn before the burlap.

Mr. Parker of Bemis Bag Company, their Traffic Manager, told us that he had had a great deal of experience in adjusting claims and that it was almost impossible to burn burlap. Other witnesses testified to the same effect.

In addition to that, R. V. Smith performed an experiment in court with one of the models representing an open bale, which consisted of loose pieces of burlap fastened together in the center. (Vol. V, p. 2680.) This was not introduced in evidence as the damage was so slight as to be almost invisible. This testimony and this evidence evidently impressed the court and we quote again from the opinion:

> "Plaintiff contends that burlap burns rapidly and even advanced the theory that it was subject to spontaneous combustion. Disinterested witnesses, including the fire department officials and men in the burlap business who were familiar with fires in burlap, stated that burlap burns readily only if exposed to an intense heat and if not piled or baled. An experiment made in court by igniting a small quantity of burlap demonstrated that it flashed up quickly for a few seconds, but immediately died out. It is very difficult to burn burlap when piled or baled. If baled it is practically impossible to burn it out of sight. One witness with long experience in the burlap

business testified that he had seen baled burlap come out of the hold of a ship where there had been fire for considerable time and estimated it would take a week for a bale of burlap to burn. In a recent fire in another bag factory, the building was practically burned down, yet bales of burlap which had fallen through the floors could still be identified. A Class C building, such as the one housing plaintiff's factory would be consumed before the baled burlap.

No great damage was done to the building or to the machinery. The principal burning was in and around the stair well and in the ceiling of the fourth floor and the roof above." (Vol. I, p. 183.)

Radford testified definitely as to the debris that was hauled away, and also as to the fact there was no merchandise obliterated, and that there was no merchandise which could not be identified.

"* * * 34 or 35 loads of merchandise were hauled from Sacramento street to Green street. No, I am not including in that total the load that Mr. Sugarman sent away. Yes, I am referring now just to the loads that went out under my direction. *No, there was not any merchandise that I found at Sacramento street which could not be identified. No, I did not find any evidence that merchandise at Sacramento street had been obliterated.* No, there was not anything said to me at any time concerning any claim as to merchandise having been burned out of sight or destroyed. Yes, I did remove debris from the Sacramento street plant. Well, the debris was removed in this manner, that when we started to

truck the bales from the basement, the floor was covered with sawdust, and we had to move that sawdust to one side, and we made probably small piles of it so that we could truck the merchandise out. The same occurred on the first floor; we removed the sawdust—I should not say sawdust, shavings is what they were—there were ten or twelve of these garbage cans in the place, we would fill those garbage cans up with shavings—I am speaking now, first, of the basement and the first floor—we would load those cans and set them out on the sidewalk, and they were picked up at different intervals by the scavenger people. I would say that a pick-up was made, well, perhaps daily, I would not say for sure whether it was daily, but at least every other day those cans were emptied by the scavengers. There were ten or twelve of those cans. As to whether there was any other debris outside of sawdust or shavings removed, well, on the upper floors there were shavings, and glass, and pieces of timber, and possibly sweepings, but not very much of that removed at that time. No, there was not any merchandise, or remains of merchandise included in the debris removed by me or under my direction." (Italics ours.) (Vol. V, pp. 2520-21.)

AS TO THE RADFORD INVENTORY.

Immediately after the fire, a party named Radford was employed, apparently by R. V. Smith, the adjuster for some of the insurance companies, and by Sugarman, to make an inventory of the stock. He came from Los Angeles, where he had done consider-

able work for the referee in bankruptcy. He was instructed by the adjuster to make an absolute complete check of everything in the building, and that if there was anything so damaged that he could not positively identify it to call it to the adjuster's attention. This is shown by the testimony of both Smith and Radford, and is corroborated by the testimony of Sugarman. In this connection it is interesting to note that Mr. Smith was anxious to do everything possible to legitimately build up the amount of the inventory. (Vol. V, pp. 2633, 2634.) His reason for doing this was that he was anxious to hold Western Insurance Company of America and the National Liberty Insurance Company. Sugarman, of course, was interested in building up the amount of the inventory and amount of loss, as his employment was based on a percentage of the amount of recovery. Radford's inventory was so careful and complete that appellant accepted it and swore to its accuracy in adopting a copy of it as a part of his schedule attached to each of the proofs of loss. Radford had work sheets on which he tallied each bale and each package of cut material as it was removed to the truck to be taken to the Green Street warehouse. Attached to each of these bales was a tag setting forth the lot number, the number of the bale and the type of the material. Mr. Sugarman was familiar with what Radford was doing and saw him making up these work sheets.

> "I remember very well seeing Mr. Radford taking the inventory. Yes, sir, I remember seeing Mr. Radford supervise the transportation of the merchandise. He had a clipboard in his hand

with some sheets on it—this was going on at the entrance to the Hyland Bag Company on Sacramento Street—he was going up and down through all the floors; and he would run over in his car, after the various loads, to the Green Street warehouse; he was giving instructions to the men over there as to the piling of the goods, and the airing of them; then he would come back to Sacramento street in time to get the other loads off." (Vol. II, p. 977.)

"I won't say Radford had a clip board when I saw him at Sacramento Street, but he had a board with some inventory sheets on it; to the best of my belief, he had sheets like that, to make memoranda on. As to his checking out the various items that were taken away from Sacramento Street, I don't know how he checked it, I didn't look over his shoulders; I know he was keeping tab." (Vol. II, p. 1014.)

In addition to these work sheets he prepared a bill of lading for each load before it left the Sacramento Street plant. These bills of lading were made out in duplicate and a copy went with the load to the Green Street warehouse for checking by Davis, Sugarman's man, who received these goods. There was an error on one of these sheets which was returned to Radford for correction. This one error consisted of giving the wrong lot number to one bale. (Vol. V, p. 2511.)

These bills of lading were produced from appellant's files and marked Defendants' Exhibit EE. (Vol. III, pp. 1585-6.) They were withdrawn by Mr. Taylor and later produced by him and marked Defendants' Exhibit FF.

"Mr. Taylor produced the Radford delivery receipts previously marked 'Defendants' Exhibit EE' which had been withdrawn by agreement, and the same being offered by defendants as the Radford bills of lading, they were received in evidence as one exhibit as Defendants' Exhibit FF. These receipts or bills of lading were prepared by Mr. R. D. Radford in connection with the removal of the salvaged merchandise from 243 Sacramento Street to the Baker-Bowers warehouse on Green Street. The characteristics and contents of the documents sufficiently appears from Mr. Radford's testimony, infra.

Permission of Court and counsel was given to Mr. Schmulowitz to withdraw the carbon copies of every bill of lading where there is a carbon copy and to make a copy of the original where there is no carbon copy." (Vol. III, p. 1593.)

As will be noted, not only the originals but the carbon copies were in appellant's files, and this information was not available to appellee until these documents were produced while Mr. Taylor was on the stand.

Not all of the goods were removed to the Green Street warehouse. Some of them remained at Sacramento Street. This merchandise is shown on pages 22, 23 and 24 of the Radford inventory. (Plaintiff's Exhibit 42, Vol. I, pp. 361, 375-6-7.) After the removal of the goods to Green Street, Radford went to that location for the purpose of inventorying this merchandise. As it is stated in appellant's brief:

"Radford took the inventory of the salvaged merchandise. (Vol. V, pp. 2503-4.) After the merchandise had been piled in the building he

was unable to go ahead and make an inventory and state the correct grade of burlap, he was not an expert in burlap. (Vol. V, p. 2525.) He was given the assitance of a man named Gus Kraus; they went straight through, and Mr. Kraus would state the grade and count the number of bolts and call the total number of yards in each bolt to him, and he would record it. (Vol. V, p. 2525.) He demanded prices on the inventoried merchandise from Mr. Taylor. (Vol. V, p. 2528.) He took the word of Mr. Kraus as to the amount and grade of each lot of burlap." (Vol. V, pp. 2588, 2591.) (Appellant's Brief p. 84.)

The reason that Radford could not take this inventory was that the tags had been removed from the bales, the bales had been opened and the bolts stacked in piles. Radford had arranged to have the damaged and undamaged goods piled separately. As a matter of fact, we find that while he was working there the goods were moved around and the damaged mixed with the undamaged. Radford made no pretense of knowing anything about burlap, its weight, grade or value. The man Kraus, who assisted him, was an employee of Hyland, and detailed for that purpose, and later appeared as a witness for appellant. Radford took his word as to the type and grade of burlap, and a tag was attached to each pile, giving it an inventory lot number and attached to this tag was an adding machine slip showing the amount of yardage in each bolt and total yardage in the lot. (Vol. V, p. 2525.) Although Ledgett tells us that a man knowing burlap could tell the difference between the various grades with his eyes closed, we find that

the grades of burlap were increased in order to raise the values and thereby enhance the damage claimed in the proofs of loss. For instance, in the Radford inventory there is included 114,638 yards of what purports to be 36″-9 oz. burlap. Mr. Taylor, who priced this inventory, knew that they had no 36-9 burlap and yet it did not excite any suspicion in his mind when he put these prices on this inventory knowing they were to be used in making up a proof of loss.

> "On the Radford inventory, items 37, 38, 41, 43, 78 to 94, inclusive, 97 to 108 inclusive, 117, 118, 180 to 183, inclusive, 227, 235, 236, 237, 242, 243, 247, 248, 249, and 250 to 254, inclusive, 325, 350, all refer to 36-inch 9-ounce burlap. I don't recall any 36-9-ounce burlap on hand May 31, 1929. I do not recall any purchase of 36-9 subsequent to May 31. I believe we did not have on hand at the time of the fire any 36-9-ounce burlap. No, it did not excite any suspicion in my mind when I was called upon to put prices on 114,638 yards of 36-inch 9-ounce burlap when I knew that we had not had or purchased any burlap corresponding to that description. I did put prices on that burlap. I did know that those prices were to be used in making up a proof of loss to submit to these insurance companies." (Vol. III, pp. 1528-9.)

There was also included in the Radford inventory 86,091 yards of burlap which was listed as 40-10. Taylor knew he did not have any such quantity of 40-10, but yet again he had no hesitancy in pricing this quantity on the basis of its being material of that character.

"Items 39, 40, 42, 109, 110, 116, 119, 179, 185, 186, 187, 188, 191 to 200, inclusive, 202 to 217, inclusive, 219 to 223, inclusive, 239 and 240, and 245 refer to 40-10-ounce burlap. We had a very small quantity in the plant at the time of the fire. I don't believe we had 86,091 yards of 40-10 burlap on hand at the time of the fire, from the books. According to the corrected Hood & Strong inventory report showing an apparent inventory on October 19, 1929, at 243 Sacramento street, we had 2414 yards of 40-10 burlap, that sounds about right. I did, yes, price these 86,091 yards as representing 40-inch 10-ounce burlap. Yes, that was supposed to have been in the plant at 243 Sacramento street on October 19th. That did not excite any suspicion in my mind, not at that time. Yes, sir, at that time I knew I was preparing these figures to be incorporated in a proof of loss." (Vol. III, pp. 1529-30.)

He knew that neither his books nor the Radford bills of lading showed that he had any 36-9 burlap. (Vol. III, p. 1532.) By grading 40-8 burlap as 40-10 the value of this burlap was increased 1¾¢ per yard, or a total of $1905.15. By increasing 36-8 burlap to 36-9 he increased the value ¾¢ per yard, thereby adding to the damage. Radford also testifies that his bills of lading did not show any 36-9 or 40-10 burlap as being removed from Sacramento Street. (Vol. V, p. 2517.)

He does show, however, that there was 116,000 yards of 36-8 removed from Sacramento Street, and 49 bales, or 98,000 yards of 40-8. (Vol. V, p. 2518.)

Radford stated that some of the bales in the basement were wet, that on the first floor there might have been some where the covers were damp. (Vol. V, pp. 2518-19.) He also states that of the bales removed from the second floor there were two which showed signs of fire on the side and top. (Vol. V, p. 2519.)

By applying Sugarman's figures of percentage damage which are used in the schedule attached to the proof of loss, this of course, greatly increases the claim for damage to this material.

Radford's inventory gives us an interesting check on the question of merchandise burned out of sight, or totally destroyed. On his work sheets he made a note of all damaged material leaving the plant. He states:

> "If merchandise was damaged I so indicated it was damaged on the work sheets." (Vol. V, p. 2513.)
>
> "A. This damage will not include any water damage.
>
> Q. You say the damage will not?
>
> A. To the various bales of burlap.
>
> Q. I am asking you about the fire damage.
>
> A. On page 11, I am reading from the top of the page, Flat No. 1, that is indicated there as the first flat that was removed, 18 bolts of damaged burlap; Flat 2 calls for damaged cotton liners, 36-6-15 this does not state the quantity that might have been on this particular flat—Flat 4 is damaged burlap sacks incomplete. They were stamped Hyland Diamond. Flat No. 5 was 17 bolts of damaged burlap, Flat No. 6, 16 bolts

of damaged burlap; Flat No. 7, was 9 bolts of damaged burlap; Flat 8, was 17 bolts of damaged burlap; Flat 9, was one flat of damaged burlap sacks incomplete—'incomplete' probably indicates that, or does indicate that they were what we term cut but not sewed. Now reading from page 12, Flat 10 is one flat of damaged sacks incomplete. Flat 11, 20 bolts damaged burlap; Flat 12, 15 bolts of damaged burlap; Flat 13, 19 bolts of damaged burlap; Flat 14, 18 bolts of damaged burlap. Flat 15, 18 bolts of damaged burlap. There does not appear to be any on page 13 or 14. There is none indicated on page 15. On page 16 the last item, there is one roll of burlap. I believe that that was scorched, but it does not indicate its condition. There is no language here regarding it (as to what language refreshes my recollection). No, no language on page 16. It calls for one roll of burlap. I would say there is no indication it was damaged, but if my memory serves me right I believe it was slightly damaged, scorched. That is all I find. I do not find any indication of any burlap or sacks damaged by fire excepting on pages 11 and 12. On pages 11 and 12 I find a total of 15 flats that show indications of damage by fire. Yes, confined to pages 11 and 12. Yes, those do represent the total number of flats, or the total of merchandise removed from 243 Saramento street, showing evidence of fire damage, with the possible exception of a roll or two, I would say, I believe there were a couple of rolls, or maybe there was a total of 7 rolls removed; I know that there were some of them scorched, they were not damaged very bad, they were scorched.

As to flats, in the picture, Defendants' Exhibit F, that is a flat in the left-hand bottom of the photograph. Referring now to the picture of the mezzanine floor, and pointing to a wooden platform, yes, I believe they classify them as lift truck platforms; that is what I refer to in my work sheets as flats. There were fifteen of those with material represented by the description in my work sheets that were removed from 243 Sacramento street, that showed evidence of fire damage, that is correct. No, I do not remember approximately the size of those flats. I couldn't give you the dimension of them, but I can tell you about what they would hold, if that is what you are interested in. They probably would hold 2000 yards of burlap, or 2000 yards of sheeting, or 2000 sacks, maybe more or less. Yes, depending, as you suppose, on the type of sacks." (Vol. V, pp. 2515, 16, 17.)

In other words, the only damaged material that Radford found and removed were these 15 flats holding 2000 yards each, or a total of 30,000 yards of burlap damaged by fire. In addition there were the two bales removed from the second floor. If we grant all the burlap in these were damaged by fire, it would be an additional 4000 yards. There was some damage to two rolls which if it did show damage to all the material, would mean an additional 4000 yards, or a total of a maximum of 38,000 yards of burlap showing any fire damage.

Incidentally, this Radford inventory absolutely disproves appellant's claim as to any material amount of merchandise burned out of sight. The records of

Hyland show that on the date of the fire there were 190,571 bags in process.

It will be remembered that Exhibits AAA, BBB and CCC, (Vol. IV, pp. 2290-1-2), which were Hart's copies of the recapitulation sheets of Taylor's perpetual inventory, and his copy of the sheet showing bales of burlap at Sacramento Street on October 19th, have never been questioned. On Defendants' Exhibit BBB, we find that the recapitulation of sheet seven shows 190,571 bags in process. This sheet also contains the figure of 61,570 domestic bags. Turning now to Defendants' Exhibit J, which is the inventory taken by Taylor and Ledgett at Sansome Street, on the morning of October 21st, we find on page three that there are 136 bales, amounting to 68,000 domestic bags. On the bottom of this sheet we find certain figures corresponding to those heretofore given, namely, the 68,000 representing domestic bags at Sansome Street after the fire, 61,570 representing domestic bags at Sacramento Street, and 190,571 representing bags in process at Sacramento Street. It is true that Taylor tried to explain these figures by stating that they must have been obtained from Radford's inventory. However, we find that on Tuesday, July 15, 1930, at a time when he admits that his memory was much clearer as to the evidence of 1929, he testified:

> "We had 190,571 bags in process of going through the factory on the Saturday night of the fire." (Vol. III, p. 1546.)

Radford's inventory, however, showed a total of bags in process inventoried by him after the fire of

189,392. This figure was tabulated and checked by Mr. Parker, the accountant for appellant. In other words, out of a total of bags claimed by appellant to have been in this building in the course of process before the fire, all but 1139 are accounted for after the fire. Radford confirms this as he testifies that after he had given Taylor a copy of his inventory Taylor informed him that he was only a few bags off. (Vol. V, p. 2605.)

During the removal of the goods, Radford testified that he checked with Taylor or Ledgett as to the merchandise on every load that went out.

> "* * * I went up and ascertained from Mr. Taylor and Mr. Ledgett how many bales of that particular kind of burlap were supposed to be in that particular lot.
>
> Mr. Schmulowitz. Q. You did that every time you came to a lot number?
>
> A. *On every load.*
>
> Q. They told you they had a perpetual inventory?
>
> A. Yes.
>
> Q. Didn't they tell you they had stock sheets?
>
> A. It was the same thing.
>
> Q. It was the same thing to you, was it?
>
> A. Yes.
>
> Q. Did they use the words 'perpetual inventory'?
>
> A. I believe they did.
>
> Q. Didn't they use the words 'stock sheets'?
>
> A. Well, they might have used both.
>
> Q. They might have used only 'stock sheets'?
>
> A. Well, I would not say that.
>
> Q. Did Mr. Taylor inform you that stock sheets frequently had errors?

A. No, as a matter of fact he told me they were accurate, said there was very little chance for error.

* * * * * * *

"I did not run to every bale. I did not tell you I did. Yes, I just checked occasional ones, I went upstairs to find out how many bales were supposed to be in that lot. Yes, I personally did that with Mr. Taylor several times during the day. Yes, I did. As to that being quite vivid in my mind, pretty clear. As to, Mr. Taylor would turn to the stock sheets and check the particular numbers and say, 'That is right, Mr. Radford'—not always Mr. Taylor, sometimes Mr. Ledgett would determine how many bales there were. Yes, Mr. Ledgett would go to the stock sheets and check with me as I was making out these bills of lading, or after I had made them out." (Italics ours.) (Vol. V, pp. 2564-65.)

"Yes, I did make a check as to baled goods or other merchandise upon completing removal of those goods from Sacramento Street. I made that check with Mr. Taylor and Mr. Ledgett. As to what, if anything, was determined by that check, the exact amount or quantity of the various bales in the lots carried by them, or of the corresponding lots, or the lots that corresponded with the tags that were attached to the various bales. As to, was there anything said as to the quantity of the bales that I had removed, I made this check at various times with Mr. Taylor and Mr. Ledgett, to ascertain if I had removed the entire lots of any particular kind of merchandise, for instance, if there were twenty bales of, we will say, of any grade of burlap in the basement, I would ask him or he would tell me—he would

refer to his stock sheets or perpetual inventory, and tell me how many bales there were supposed to be in that particular lot, and in that way I would know that I had removed that complete lot. As to, did I make any final check on the total, well, I did after the completion of the inventory. Yes, that was after the completion of the inventory." (Vol. V, pp. 2521-22.)

"Q. Yes, and *in the inventory you have included only the material that was salvaged, isn't that correct?*

A. *All of the merchandise in the building.*

Q. What is that?

A. All of the merchandise in the building.

Q. That was salvaged, isn't that correct?

A. No, *all that was in the building.*" (Italics ours.) (Vol. V, p. 2609.)

R. V. Smith, the adjuster for some of the companies, also testified:

"Mr. Thornton: Q. Mr. Smith, did you on any of these floors that you have described or on any other floor see any indication of any merchandise having been burned out of sight?

A. There was no merchandise that was burned out of sight. There was no merchandise in the radius—no evidence of any merchandise in the radius of the fire that could have been burned out of sight.

Q. Was there any evidence of any merchandise having been burned out of sight in any portion of that building?

A. None, whatever.

Q. Was there any place pointed out to you, or did you make any inquiry as to any portion of

the building in which any merchandise was claimed to have burned out of sight?

A. *Many times I challenged Mr. Sugarman or Mr. Hyland to show me one place where there was something burned out of sight.*" (Italics ours.) (Vol. V, p. 2691.)

AS TO EVIDENCE OF ACTUAL DAMAGE TO THE MERCHANDISE.

As we have just pointed out, Radford has stated that there was no merchandise obliterated or so damaged that it could not be identified, and that every bit of merchandise was inventoried, either in the plant at Sacramento Street or in the Green Street warehouse. He was asked as to the percentage of the merchandise which was undamaged and testified as follows:

"Mr. Thornton. Q. From your experience during the time that you were at the Green Street Warehouse, could you estimate the amount or percentage, not asking you to place it in yards or dollars, of merchandise at Green Street which was undamaged?

* * * * * * *

A. You mean undamaged?

Mr. Thornton. That was undamaged in any respect.

A. I will say, I did not actually figure it out, but it would be safe for me to say 75 or 80 per cent.

Q. 75 to 80 per cent of the merchandise at the Green Street Warehouse would not show any damage of any kind: Is that correct?

A. That is correct." (Vol. V, pp. 2532-3.)

Smith testfies that before proofs of loss were filed, he met appellant and Sugarman at the Green Street warehouse, that Hyland claimed he could not use any of the merchandise and that he was going to claim a total loss. Hyland refused to proceed with an adjustment and Sugarman suggested that Smith go through the merchandise, put down his idea of the damage and that perhaps they could get together. He did this and that Sugarman told him there was no chance to get together as Hyland had already told him what was wanted. (Vol. V, pp. 2606-7.)

He states that he went through the various lots as shown in the Radford inventory, marking "F.D." where there was any fire damage, "W.D." where there was any water damage, and "O.K." where there was no damage, and setting forth the percentage of damage which he estimated on each of the lots shown in that inventory. (Vol. V, p. 2708.) He showed these percentages to Sugarman, who was with him part of the time. (Vol. V, p. 2709.) This instrument which he prepared at Sugarman's request, and showed him before the proofs of loss were filed, was introduced in evidence as Defendants' Exhibit TTT. (Vol. V, pp. 2710-2721.) He states that Sugarman prepared all the prices, the only thing he put on was the percentage of damage and pencil notation showing the cause of the damage. (Vol. V, p. 2709.) This witness then prepared a document showing a comparison between the claim of the Hyland Bag Company and the amount of loss and damage as he ascertained it. This was introduced in evidence as Defendants' Exhibit UUU. (Vol. V, pp. 2723-44.)

It is interesting to note that there was no attack of any kind by appellant during the course of the trial and no evidence introduced to contradict or refute these statements. In this exhibit Smith gave effect to the fact that 36-9 burlap should actually be 36-8, and that 40-10 should be actually 40-8. (Vol. V, p. 2745.) The first sheet is a recapitulation sheet in which he takes each of the pages and shows the cost and loss as claimed by Hyland and what he designates as the actual cost and loss. He states, however, that the cost as shown by him under the column headed "actual" is too high.

> "Yes, that cost is too high, in view of the testimony that has already gone in here from the Bemis Bag Company." (Vol. V, p. 2811.)
>
> "For a long time I couldn't get any prices around this burg. Because of Mr. Hyland going around and asking people not to give me prices." (Vol. V, p. 2812.)

And yet, with these prices which he admits are too high, he finds an actual value of this merchandise of $66,626.05, and an actual loss of $10,171.92. His method of determining these amounts is set forth on the other pages, which represent the Radford inventory, showing the unit cost, total cost, precentage of damage and loss as claimed, and also showing what he sets forth as the actual unit cost, total loss, percentage of damage and loss.

As we have shown, he did not know that Mr. Wyckoff and Mr. Young had made an itemized list showing the damaged and undamaged merchandise.

(Vol. V, p. 2750.) As a matter of fact, his percentages of damage were made before they saw the burlap.

Mr. Sugarman was called on rebuttal, but he did not question Mr. Smith's testimony. As a matter of fact, he corroborated it to the extent of testifying he was present at the time that Smith ascertained these percentages for damages.

A copy of this exhibit UUU was furnished to the attorney for appellant upon his statement that he would like to have it checked by his accountants. Evidently a check was made, as Mr. Hyland, when called on rebuttal, referred to a net shortage of $2.13 shown on the recapitulation sheet, and stated that a check showed that Mr. Smith was in error as to that amount, and yet there was no attempt made to attack Mr. Smith's testimony relative to values, percentage of damage, or the totals arrived at by him. It is also interesting to make comparison between his figures and those presented by Young and Wyckoff, and to find that in the one or two instances where Smith does not absolutely agree with them, although he did not know of their visit or of their work, the disagreement is caused by the fact that he has allowed damage where they found there was no damage to the material.

John J. Parker was called as a witness by the appellee and testified that he was Traffic Manager for Bemis Bros. Bag Company, that in the course of his duties he passes on damaged burlap for that company. That he was instructed to examine the Hyland burlap

at the Green Street warehouse. (Vol. IV, p. 2244.) He further states that 75 to 80% of the burlap was good, excluding that which showed fire damage.

John W. Wyckoff, then factory superintendent for Ames-Harris & Neville, was called. He testified that he had had occasion to determine damage on burlap in adjusting claims for his company. (Vol. IV, p. 2189.) He went to the Green Street warehouse in company with Mr. Young of Bemis Bag Company. There he examined every pile of burlap, except a few which were damaged badly, and he examined every pile of good burlap on either three or four sides to see if he could discover any stain or burn. (Vol. IV, p. 2191.) He found quite a few bales tagged as 40-10 which he put down as 40-8. He also found some tagged as 37-10 which he put down as 37-8. He also found quite a few bales marked 36-9 which he questioned as it might have been 36-8. (Vol. IV, p. 2192.) He states there were maybe ten or twelve piles that were pretty badly burned or stained from which they could get no salvage from a new bag manufacturer. (Vol. IV, p. 2193.) As he examined this merchandise he wrote down a report to submit to his employers. (Vol. IV, p. 2193.) Where he reported material was good he meant he figured it as new goods and they could take it in and use it as such. (Vol. IV, p. 2194.) He marked some of the bags as being "patched and pieced" and "some dirty". (Vol. IV, p. 2195.) He reported some burlap as stained and marked two items as "bad". (Vol. IV, p. 2196.) He went over those goods lot by lot and pile by pile, reading off the number and the yardage, and noting the type of damage, as he was

looking for damage. (Vol. IV, p. 2197.) The transcript sets forth in detail the lot number and the fact as to whether they showed damage or no damage. (Vol. IV, pp. 2198-9, 2200.)

On cross-examination it was shown he considered 75 to 80% of this material as good. (Vol. IV, p. 2201.) As a matter of fact, out of the 73,226 yards of cotton sheeting which he reported as good, he stated that Ames had used 40,000 to 50,000 yards of it for new liners for sugar sacks. (Vol. IV, pp. 2195-6.) They paid 4¢ a yard for this sheeting which was ⅛¢ below the market price of the date of purchase. (Vol. VI, p. 3033.)

C. T. Young, the superintendent of Bemis Bag Company, was called and corroborated the testimony of Mr. Wyckoff as to their inspection and making a list of the merchandise at the Green Street warehouse. (Vol. IV, p. 2235.) He stated they figured this stock the same as they would have a bankrupt stock instead of one that had gone through a fire. (Vol. IV, p. 2235.)

As we have already pointed out, these witnesses knew nothing about Smith, and yet they agree with him, except in one or two instances, where he allowed damage which they did not ascertain although they were there representing their companies for the purpose of ascertaining the amount of damage and making recommendations as to whether or not their employers should purchase these goods. A summary of their report shows they found 340,507 yards of material absolutely undamaged. They also found 167,-

948 bags undamaged. As we have before pointed out, there were 190,571 bags in process at the factory at the time of the fire. Of these, the Radford inventory accounts for 189,362. Young and Wyckoff find at the Green Street warehouse 167,948 of these bags absolutely undamaged. In view of this showing it is easy to understand why the trial judge stated:

> "The heart of the plaintiff's contention is that large quantities of goods were burned out of sight." (Vol. I, p. 182.)

and

> "Not only does the proof show negatively that there was no substantial quantity of merchandise obliterated by the fire, but it shows affirmatively that the amounts claimed were fraudulently built up." (Vol. I, p. 186.)

and

> "What I have said about the impossibility of an out of sight loss in this case establishes that the claim of $15,000 worth of goods obliterated as well as the subsequent claim of a larger amount were alike fraudulently excessive.
>
> There was lack of good faith in fixing the proportion of loss on the salvaged goods. I have referred to the fact that disinterested witnesses have testified that this merchandise was damaged not in excess of 25%. Yet a loss of $53,586 was claimed on this." (Vol. I, p. 191.)

AS TO PRICING OF RADFORD'S INVENTORY AND PROOF OF LOSS.

We have already shown that this pricing was done by Taylor at Hyland's direction. We have also shown that in pricing that inventory Taylor put down prices on 114,638 yards of 36-9 burlap, knowing that they did not have and had not purchased any burlap of that description, and also knowing that when he put those prices on the inventory that they were to be used in making up proofs of loss to submit to these insurance companies. (Vol. III, p. 1529.) We have also shown the same situation relative to Taylor's pricing 40-10 burlap.

Referring to the testimony of appellant, it will be noted that on cross-examination he was testifying as to various data from a card in his possession. This card was received in evidence and marked Defendants' Exhibit B. (Vol. I, p. 440.) It was in appellant's handwriting. It will be noted that the first item shows that the merchandise at Sacramento Street at *"landed costs"*, amounted to $132,947.44, and that the merchandise *"obliterated or O o sight"* amounted to $46,139.46. On being questioned concerning this exhibit Hyland said:

> "Yes. I have made notations from various reports of auditors, from which I have been testifying, *and which figures, I may add, I knew to be correct from my own personal investigation.*" (Italics ours.) (Vol. I, p. 441.)

When further questioned as to the pricing being on the basis of landed cost, he testified:

"Mr. Thornton. That value of $102,453.23, what value does that represent? Does it represent the replacement cost of that merchandise on October 19?

A. I believe that that represents the landed cost to us. I cannot state positively, as the work was all done by Mr. Sugarman and by Mr. Taylor." (Vol. I, p. 526.)

"Yes, we always pay attention to Calcutta prices. I believe you are correct in your question that there are on file in the individual customs houses the Calcutta prices sent each day by the Consul in Calcutta, but I cannot state positively. At various times, yes, we receive cables and telegrams relative to prices. We very often had cables oftener than once a week. Sometimes every day, probably.

The prices set forth in that proof of loss represented our actual cost, to the best of my recollection. That is to the best of my belief. I don't know that to be an actual fact. I had nothing whatever to do with making that up." (Vol. I, p. 527.)

When he was confronted with the schedule attached to his proof of loss, he testified:

"I cannot state 'whether any of the prices set forth in that schedule represented the actual value on October 19.'" (Vol. I, p. 528.)

"Q. Can you tell us anything about the values which you set forth as to manufactured bags?

A. I did not set forth these values. I can only repeat that Mr. Sugarman and Mr. Taylor handled the entire thing. I personally had nothing whatever to do with it.

Q. Then you could not look at this inventory or at this proof of loss and tell us whether or not the values set forth as to cotton sugar liners, or A.B.S. sacks, or beet pulp sacks, or any of the other sacks included in there, are correct?

A. It is my understanding that they were, or I would not have signed it. The work was left entirely in the hands of Mr. Ben Sugarman and Mr. Taylor.

Q. Did you examine them to see if they were correct?

A. I did not." (Vol. I, p. 529.)

It will be noted that in this testimony he endeavored to hide behind Taylor and Sugarman. It has also been stated he was not at all active during the two or three years before the fire. However, we find him testifying as follows:

"As to what duties I performed on behalf of the Hyland Bag Company during the years of my ownership of it, with particular reference to the three or four years immediately preceding the fire, I personally handled all of the large purchases. To explain that, Mr. Ledgett, who acted as purchasing agent, only handled the small local stuff, the small purchases. The large purchases, consisted of 90 per cent. of all the materials that we were using in our factory and I handled those all. In addition to that, I personally for three or four years prior to the fire, handled every sale that was made there, and the sales would average per year well over $2,000,000.00. So you can well appreciate the fact that in handling all these details that I could not possibly have handled everything else, such as watching the insurance,

doing the bookkeeping, and everything else. It was not possible." (Vol. I, pp. 546-7.)

"I personally handled purchases of burlap and carload lots of sheetings, etc. As to what I am designating as a large purchase—a quarter of a million yards; a quarter of a million yards of cotton sheeting and similar quantities of burlaps. Yes, if there was a purchase to be made involving 100,000 yards of burlap I would personally make that; I handled all of the purchases from Calcutta, all of the Calcutta purchases. Not as a rule did I purchase goods locally. Occasionally when we found ourselves short we might pick up some locally, yes; if Mr. Ledgett was not available at the time I would not handle it. As to that being in one or two bale lots, that would be in smaller quantity lots. It all depends on what we require. Oh, no, not at all would Mr. Ledgett enter into contracts involving 500,000 yards, or more. Any contracts totalling that amount would have been entered into by me personally. Yes, I would be familiar with the prices on those contracts. Yes, sir, I personally handled all sales. I mean by that practically all the sales; there might have been an occasional order brought in by Mr. Ledgett that did not amount to a great deal in volume of dollars. I handled practically all of the sales of the Hyland Bag Company, all of them. I mean all sales of bags, and burlaps, as well. I was familiar with the prices on those sales. Quite so, I would be familiar with the prices as to sales to the American Beet Sugar. I do not endeavor to memorize those things, however. Once a transaction is finished there is no occasion for me to memorize it at all. At that time, October 19th,

yes, I was familiar with those prices. As to whether, as you ask, I had forgotten the October 19th prices upon the 24th day of December, of bags and burlaps, I never try to memorize prices. There was no occasion to do so. We had our price sheets to refer to. They were always there. I do not recall whether I referred to them at the time I signed that proof of loss, except that I can say that that proof of loss, as I have told you dozens of times, all of the detail work on that was handled by Mr. Sugarman and by Mr. Taylor. I had nothing whatever to do with it" (Vol. II, pp. 574-5-6.)

Yet prior to that time he told us:

"As to being familiar with the value of burlap, I am fairly so. *I was familiar with the value on October 19, 1929, and I am today.*" (Italics ours.) (Vol. I, p. 526.)

On rebuttal, when he thought he needed evidence to contradict our expert, he professes to know values. (Vol. VI, pp. 3296-7.)

He had already given a number of figures as to values and admitted that these were from the Bemis price list. (Vol. II, p. 576.) In other words, instead of being landed or replacement costs these figures were the prices at which anyone not in the trade could go in and purchase one of five bales of burlap. (Vol. II, p. 577.) In these figures were included the profit that Bemis would have made on a retail sale. He claims that he was not thoroughly familiar with the schedule attached to the proof of loss, nor was he thoroughly familiar with the Radford inventory, he had looked it

over just casually. (Vol. I, p. 446.) Yet, he did appear before a Notary Public and swear to the correctness of the statement. He knew the schedules on the proof of loss were prepared for the purpose of presenting the same to the insurance companies and for the purpose of making claims under the insurance policies. He caused these proofs of loss to be presented to the insurance companies for the purpose of collecting the money. (Vol. I, p. 442.)

When Sugarman was called as a witness for the appellant, he testified:

> "I agreed with Mr. Smith that it should be priced upon the replacement value in San Francisco at the time of the fire, and we agreed that we would add, in determining that cost, a fraction of a cent, I cannot remember at this time what that fraction was, to take care of cables, and other overhead that went into the purchase of this merchandise." (Vol. II, p. 980.)

> "Answering your question, it is possible that it was one-half cent over the five-bale price, but I am not positive. *I want to correct that, there was no discussion as to a five-bale price with Mr. Smith. No, there was no discussion with Smith on the five-bale price.* There was a discussion with Mr. Smith for the addition of a fraction of a cent over the market price with particular reference to cables and other expenses that we specially referred to. Yes, cables were referred to as the reason why that fraction of a cent would be allowed over and above the market price. Cables and other things were referred to." (Italics ours.) (Vol. II, pp. 980, 981.)

He further states:

"I had nothing to do with the pricing of this inventory, that is the unit cost of burlap or of bags, only in so far as I conveyed to Hyland the result of my discussions with Smith, and Hyland showing me the Bemis price list. Mr. Hyland showed me that, yes. I don't know whether he produced it from his files, but he showed it to me in his office. I did not instruct him to price that on the five-bale lot list appearing on those Bemis price lists, but I advised him that I thought that would be the proper method of pricing it." (Vol. II, p. 1004.)

"After the Radford inventory was returned to me with certain prices on it, I did not check over those prices, either as against that Bemis price list or as against landed costs. I had no knowledge as to whether that price list was based on a higher figure than on one-bale-lot cost in the Bemis list. *I had no knowledge of Hyland's landed cost.* I don't know that Mr. Hyland was not a retail buyer. I knew he was a buyer of a lot of burlap. I knew he was buying in India because I took up the question of telegrams and cables. I knew that he was a big buyer of burlap. Yes, I accepted the figures as given to me by the Hyland Bag Company and extended those figures and incorporated them in the schedule in the proof of loss, of course I also knew that as to some of that merchandise he perhaps could not have replaced it at the time of the fire without going to foreign markets. Yes, I made inquiry about that, I asked Mr. Hyland about one item. No, sir, I did not inquire from Bemis or from Ames-Harris if they had large stocks on hand. As to inquiring from

Bemis or from Ames-Harris as to landed costs, *I inquired of no one as to landed costs.*" (Italics ours.) (Vol. II, pp. 1005-6.)

Smith says:

"Sugarman brought this schedule into my office and told me that he had the prices filled in on the inventory, and wanted me to go to the Baker-Bauer Warehouse and down to Sacramento street, and go over the stock with him and Mr. Hyland for the purpose of making an adjustment. He said that this was what the merchandise was priced at by Mr. Hyland. I asked him what information he could give me to support those prices. I asked him if he had any quotations which Mr. Hyland had received with the date of the bill which would verify these prices. I told him that I was entitled to that information. He told me that I was not entitled to that information, that Mr. Hyland would have to show me all his prices to verify these prices, or else they would have to be changed. We could not agree on the prices, and he could not give me the supporting information that I required on the prices." (Vol. V, p. 2706.)

"They filed the proofs of loss about the 24th or 25th of December, as I recall it. It was a short time before that. They were in my office. *I asked Mr. Hyland at that time how he fixed the prices on that schedule.* He told me that those were from telegrams that he received quoting prices, and they were in code, and he deciphered them properly. I asked him if he did not think it the proper thing to let me have the key to the telegrams, and let me make comparisons on those, so I would have something to check on; I ex-

plained to him at the time that I had been unable to get price verifications from other burlap brokers or other dealers, they were somewhat reluctant about giving me prices; I told him I would have to make some check on it before I could agree to any value. He told me that those were his private affairs, and that was all the information I could have on that subject. *I also asked him at that time if he was satisfied with the grades as well as the prices that he had given me, and he told me that he was, and that I would find that those were 100 per cent right.*" (Italics ours.) (Vol. V, p. 2754.)

"I said, 'If you file a proof of loss and you set up incorrect grades or incorrect quantities, or incorrect prices, and swear that those are the correct prices, you will vitiate your policy contract, and by the terms of the contract you might lose all your insurance.' I said, 'I want to warn you of that.' I said, 'I have called Mr. Sugarman's attention to that, and I want you to know that I told him about it.' I addressed that conversation to Mr. Hyland. Mr. Hyland was a little bit peeved at that and said, 'We will take all the chances on that.' Sugarman said, 'You don't need to worry about that, R. V., we will take all the chances on that, we will attend to that.'" (Vol. V, p. 2755.)

"So that it was after the inventory was completed by Mr. Radford and the items of the inventory were priced that you first had a discussion with Mr. Sugarman on the matter of the addition of one-half a cent per yard on the various items?

A. Yes. In that respect he explained that Mr. Hyland had an office in New York, and I under-

stand that he maintained a clerk or a buyer there, and there were telegrams exchanged between that office and this office, and purchases were made through that agency, and by maintaining that office Mr. Hyland was able to buy cheaper than he could buy here, transacting business here, as the other dealers did, and that gave him an edge on the other dealers. And Mr. Sugarman said that I would not be entitled to that price of Mr. Hyland's, which was through his purchasing power, and I said I would be entitled to his purchasing power—I said the insurance company would be entitled to figure on the loss of what it would cost the insured to replace the merchandise, and I said we did not want the services of his buyer or his organization for nothing, I said, whatever proportion of expense of maintaining that office should be allotted to this quantity of merchandise, that amount could be added as a buying cost, that is, cost of buying is part of the cost of the merchandise, I explained that to Mr. Sugarman, and he thought it would be half a cent a yard, and I told him I thought it would be an unreasonable amount, I said, 'Whatever it is we would be glad to add that,' but we did not agree on it. And, besides, he would not give me the price which Mr. Hyland bought at, he would not give me his low-down prices." (Vol. V, pp. 2815-2816.)

Again we want to call the court's attention to the fact that while Smith did represent some of the appellees, that there is no attempt to show any conversation with any other adjusters.

C. T. Young, who was the superintendent and assistant to the manager of Bemis Bag Company, testified that they made up price lists which were sent to the trade. That on this list there were two prices, from 1 to 5 bales, and 5 bales or over. For 5 bales or over the price would be ¼¢ per yard less. (Vol. IV, p. 2208.) He also stated that an outsider not engaged in the burlap business could come into the plant and purchase 5 bales at that price, that they were willing to give it to anyone who came in and took 5 bales of burlap. (Vol. IV, p. 2209.) He also testified that the trend of the market during 1929 was downward, and has been consistently so ever since. These lists were made up as a guide to the salesmen who could immediately give a discount of ¼¢ a yard on a sale of 5 bales or more. (Vol. IV, p. 2218.)

He further testifies:

> "Regarding having said that I hardly thought Mr. Hyland would have assumed the 5-bale price list as what he would have had to pay for large quantities, and explaining that, generally speaking, this list that has been submitted is more or less what you might call a retail trade list, although we do not have any such term as retail trade. It is made up particularly for very small purchases. Anything that gets to any quantity, even as low as 25,000 yards, we would not consider that list, at all, and I hardly think anyone in the burlap manufacturing business would consider that list. Yes, 'in other words that is general information to the trade'. I would consider it so. Mr. Hyland has been in this business a

number of years, yes. I believe Mr. Hyland was supposed to be a very good buyer."

* * * * * * *

"As to explaining that in making sales in cases of the five bales we would not have considered the price list, merely that we would feel that list would have been too high to have secured any business, therefore we would not have taken that list into consideration had we been desirous of securing a particular order that we quoted on. *As to, then anything in 25,000 yards or up there would have been a reduction from that price list, there would have been.* (Over objection): *As to, would that have been a material reduction, yes, we would have made a material reduction from this price list."* (Vol. IV, pp. 2227-2228.)

He also stated that they were carrying large stocks in October, 1929, and would have been very glad to have made large sales of burlap at that time. (Vol. IV, pp. 2232-2233.)

He also testified:

"Yes, the selling price that I read off from that sheet of September 30, 1929, was a one-bale selling price. From that there would be deducted at least one -quarter of a cent on five-bale lots. Might I further amplify that, that even at that time if we had an inquiry for five bales, I believe there were verbal instructions to our salesmen to take it up with the salesmanager or the manager for prices; in other words, we may not have adhered strictly to the quarter of a cent reduction, we might have made more." (Vol. IV, pp. 2238-2239.)

We also called Alexander Logie, who had been engaged in the burlap business for over fifty years in Scotland, New York, India and San Francisco. He produced a list of prices of burlap which was introduced in evidence as Plaintiff's Exhibit 137. (Vol. IV, p. 2175.) In this connection he stated:

> "As for saying that these prices that I have quoted in this list (Exhibit No. 137) would be the precise prices at which I would have sold these products to Mr. Hyland on October 19 or 21, 1929, these prices on the list that I have given you are the landed price ex dock, duty paid, including insurance, that Mr. Hyland would probably have had to pay." (Vol. IV, p. 2181.)

As we have pointed out, appellant was not satisfied to attempt to recover ½¢ in excess of the price at which anybody not in the trade could have purchased this burlap, locally and at retail prices, he had to increase the quality of the burlap from 36-8 to 36-9 and 40-8 to 40-10, thereby adding another $6175.06 to the alleged value of this burlap. With all his knowledge of purchases and sales he was still willing to swear to the truth of these figures and present them to these insurance companies for the purpose of collecting a fraudulent claim.

In order that the court may more readily grasp the significance of these prices, we have prepared a tabulation which is set forth below, showing a comparison of values as set up in the proofs of loss and as testified to by Mr. Logie and Mr. Griffits.

In the Bemis list, as presented by Mr. Griffits, there is a slight range in price, and we have invariably taken the higher. He states:

> "The amount of profit we would add would vary, perhaps, I would say, from 1 to 5 per cent. Yes, from 1 to 5 per cent over these prices I have just given you. Yes, when I say 'large quantities' I mean in excess of 25,000 yards." (Vol. IV, p. 2254.)

Kind of Material	Values		
	As per Proof of		
	Loss	Logie	Bemis Bag
31/15	.13⅜	.0975	.0928
36/8	.07¼	.0575	.0549
36/9	.07⅞	.0640	.0619
36/10	.08¾	.07	.0691
37/10	.09	.072	.0702
40/8	.08⅛	.0625	.0589
40/10	.09⅝	.077	.0761
45/7½	.09⅛	.0695	
45/8	.09¼	.071	.0684
40/12	.11¾	.092	.0826
54/8	.11⅛	.086	

We have already pointed out in appellant's testimony that he personally handled all sales, yet we find he swore to a proof of loss setting up value of A. B. S. bags incomplete at $199.65, and yet their net price of those same bags complete, and with liners, was $169.00, or a difference of $30.65 per thousand. (Vol. III, p. 1628.) Other bags were similarly marked up.

AS TO THE NEWHALL "FICTITIOUS CONTRACTS".

It will be noted that in and by each of the contracts of insurance which were introduced in evidence, and which are the California Standard form of fire insurance policy, it was and is provided:

> "The company will not be liable beyond the actual cash value of the interest of the insured in the property *at the time of loss or damage, nor exceeding what it would then cost the insured to repair or replace the same with material of like kind or quality.*" (Italics ours.) (Vol. I, p. 295.)

There had come into our possession a document entitled "Hyland Bag Company, Proposed Merchandise Purchases for Period October 19 to December 31, 1929". This document purported to set forth certain purchases from H. M. Newhall & Co., under dates varying from June 20 to August 20, 1929, of 2,400,000 yards of various types of burlap to arrive in San Francisco from October 15 to November 15, 1929. The landed cost varied materially from the claim as set forth in the schedule attached to the proof of loss. For purposes of comparison, we have prepared a table which is set forth below:

Type of Burlap	Value as Per Proof of Loss	Landed Cost as per Exhibit HH
31-15	.13375	$.0925
45-7½	.09125	.07448
40-12	.1175	.1060
36-9	.07875	.06598
37-10	.09	.07725
40-10	.09625	.08697
Cotton		
36-6.15	.07125	.0553

These contracts were first called to the witness' attention on his original cross-examination, after he had testified to Bemis Bros. Bag Company's 5-bale price as being replacement value as of October 19th. This examination covered pages 579 to 584, and it will be noted that the witness was very evasive. At that time we demanded production of these contracts as they were the only positive evidence that we had been able to obtain up to that time showing overpricing. This witness was recalled by appellant and stated he had made a search for these contracts, but had been unable to find them. Mr. Schmulowitz stated he would stipulate as to the material facts of these contracts and would try to get copies from H. M. Newhall & Co. (Vol. III, p. 1643.)

At the commencement of the cross-examination of the witness D. A. Parker, Mr. Schmulowitz was asked if he was prepared to produce these contracts. He replied that he would stipulate to their contents. (Vol. III, p. 1676.) Parker testified that he had turned these contracts over to Mr. Lilly, of Pace, Gore & McLaren. (Vol. III, p. 1677.)

Pursuant to Mr. Schmulowitz' agreement that we might ask Mr. Lilly for these contracts, we got in touch with Mr. Lilly, who advised us that these contracts had never been in his possession. We so advised court and counsel. Mr. Parker was then put on the stand on rebuttal and testified that Mr. Milner, a representative of Mr. Lilly's office, had come to see him in connection with this matter, had examined and checked these documents, and on leaving had taken some documents with him. That that was the

last time Parker remembered seeing the contracts. (Vol. VI, p. 3311.)

The only witness called by us on surrebuttal was G. E. Milner, a public accountant associated with Pace, Gore & McLaren, who testified that at Mr. Lilly's direction he had gone to the office of Parker at Hyland's office, in the fall of 1930, to check certain documents, that *he was not requested to check these contracts, did not examine them, and did not take them with him.* (Vol. VI, p. 3379.)

We had already discovered that Colbert was on the payroll of Hyland in September, 1929. We had also discovered that there was further evidence of the dealings between appellant and Colbert, as evidenced by Journal Entry No. 897, which was introduced as Defendants' Exhibit JJ. (Vol. IV, p. 1729.) It will be noted that this is one place where appellant cannot claim to have no personal knowledge of his books, as it is the only entry which is personally signed by Richard C. Hyland. It shows that George P. Colbert, an employee of H. M. Newhall & Co., and the man appointed by appellant as his competent and disinterested appraiser, received commissions from Hyland for purchase of burlap from Newhall. These purchases, as indicated by the contract number, are the 350,000 yards actually received after the fire, and the 100,000 yards actually sold by Newhall in December, 1928, the contract being cancelled and a new invoice made at a lower price under date of June 20th, although the goods had been received and used prior to that time. In addition to receiving commissions on these sales, Colbert was given a portion of

the amount of the refund to Newhall, received as the result of the cancellation of this contract and purported resale at a lower price, which was put through in this journal entry as a credit for inferior burlap.

As a result of this discovery, Colbert was recalled. This witness testified that about November, after the fire, he had a conversation at Hyland's office. (Vol. IV, p. 1570.) Hyland asked him to prepare certain contracts, which could be cancelled, on which he could predicate the value at which goods could be replaced in making up his proof of loss. (Vol. IV, p. 1751.) He furnished Hyland with blanks to make up these contracts, and the contracts were made up but he did not get any copy of them. Hyland prepared a letter to H. M. Newhall & Co., handing him the original, which, as the contracts were null and void did not represent actual sales, he destroyed and never put in the file. These contracts were signed H. M. Newhall & Co., by Geo. P. Colbert, and were left with Mr. Hyland. (Vol. IV, p. 1752.) He had no authority to sign any contracts. On examination by Mr. Schmulowitz, he testified:

> "Within the last few weeks Mr. Hyland telephoned to me and asked me to revise the figures on these old contracts and I supplied him with new forms and the contracts were signed and they were automatically cancelled in my presence by Mr. Hyland. Yes, within the last few weeks. I could not say whether those copies of those contracts were the counterparts of these numbers, I never checked the contracts back, I never was given copies of the contracts, because I never

placed any value on the contracts, as of no consequence in connection with H. M. Newhall & Co." (Vol. IV, p. 1766.)

He also identified a copy of a letter dated October 22, 1929, and received in evidence as Plaintiff's Exhibit 119 (Vol. IV, p. 1771) as a copy of the letter addressed to H. M. Newhall & Co., attention Mr. Colbert, by Hyland. It will be noted that this letter asked Colbert to dispose of the merchandise represented under these "fictitious contracts", but expressed his desire to retain bona fide contracts which were held with Newhall. Appellant then also introduced in evidence letters from H. M. Newhall & Co., signed by Geo. A. Newhall, Jr., calling the attention of appellant to the fact that certain contracts with H. M. Newhall had not been signed and returned to them. (Plaintiff's Exhibit 120, Vol. IV, p. 1776, Plaintiff's Exhibit 121, Vol. IV, p. 1785.) On recross examination, however, it was stipulated that the numbers of the fictitious contracts did not appear in these two exhibits. Colbert also testifies:

"As to having stated that subsequently, within the last two or three weeks, *I had prepared other contracts for Mr. Hyland,* I don't know exactly the date, but it was *probably three or four weeks ago.* I think it was since the trial started, yes, I am quite sure it was. *This trial started October 13, yes, it was after that date.* Yes, I said they were also prepared by Mr. Hyland. Yes, I signed them 'H. M. Newhall & Co.' by myself. No, *they did not represent any actual sales of burlap. Yes, they were also fictitious contracts.*

The Court. These contracts mentioned in HH are fictitious contracts?

A. They were contracts, Judge, that were prepared, as I said in my testimony, to show prices only. That was what they were to be used for, prices at which——

Q. (interrupting). Still they were fictitious?

A. They were fictitious.

Q. Have you just testified that there were other contracts which were fictitious?

A. Yes.

Mr. Thornton. *They were prepared by Mr. Hyland and signed by you since the starting of the trial of this case?*

A. *Yes, I don't know the exact date, but it was since this trial started.*

* * * * * * *

The Court. Yes. Q. Are those contracts numbered, the contracts made since the trial commenced?

A. I don't know, your Honor, whether they were numbered or not, they were given for the same purposes as those were given; whether they had numbers on them I could not say positively." (Italics ours.) (Vol. IV, pp. 1800-1801.)

Mr. Almer Newhall was then called as a witness and was shown Plaintiff's Exhibit 122, which is identically the same as Defendants' Exhibit HH. He testified:

"A. There are no contracts shown on this page that are contracts to which H. M. Newhall & Co. is a party, and there were no such cancelled contracts. We made no such sales.

That is correct, in other words, H. M. Newhall & Co. made no contracts bearing the contract num-

bers, the dates of the contracts as they appear on this sheet. No, H. M. Newhall & Co. did not make any contracts with the Hyland Bag Company or Richard C. Hyland covering burlap of the description set forth on this sheet for shipment or for delivery on the date set forth in Plaintiff's Exhibit 122. No, there were not any contracts between H. M. Newhall & Co. and Hyland Bag Company cancelled after the fire of October 19, 1929. I have at your request examined my books to ascertain what the contracts bearing these numbers actually represent. I have brought the original contracts here in a suitcase and would like to have the suitcase." (Vol. IV, pp. 2079-2080.)

He produced a summary of the books of H. M. Newhall & Co. which was introduced as Defendants' Exhibit NN. (Vol. IV, p. 2081.) The gist of this report covering these fictitious contracts is as follows:

Newhall contract 1449 was actually dated August 22nd and covered a sale of 1000 bales of raw jute to the California State Prison at San Quentin. Contract 1541 was a sale of 25 cases of abalone to Sumatra. Contract 1542 was for the sale of 100 bales of California cotton to Japan. Contract 1578 was a sale to the Pacific Bag Company of 400,000 yards of burlap. Contract 1593 was for the sale of 36 bags of tapioca to Standard Grocery Co. Contract 1602 covered the sale of 25 bales of 40-10 burlap to the Pacific Bag Company. (Vol. IV, p. 2082.)

On cross-examination this witness produced the contract books. (Vol. IV, pp. 2130-31.) It appears that these records were numbered when they were printed

from 1 to 10,000. (Vol. IV, p. 2144.) There had been no changes or alterations in these sales registers and the contracts followed in their regular number. The register does not indicate any changes or erasures. (Vol. IV, pp. 2049-2050.)

AS TO OTHER FALSE SWEARING BY APPELLANT DURING THE COURSE OF THE TRIAL.

Appellant was recalled on rebuttal and categorically denied all testimony which had been given adverse to him. But to show the boldness of this witness, his absolute disregard for the truth and his readiness and willingness to commit perjury under any and all circumstances, we desire to call the court's attention to Exhibit 165 (shown in Volume 6, p. 3258), introduced while he was testifying on rebuttal. In the first place, this exhibit admits our contentions that 36-8 and 40-8 burlap were listed and priced as 36-9 and 40-10 burlap. He also made another admission for which we contended throughout the trial, namely, that 42,880 pounds of burlap bale covers included in his claim as lot No. 403, of a value of $2572, were really only 8880 pounds. (This is another over-statement of $2039.20, according to his own admission, although we have not taken the time of the court to discuss this item.) In this exhibit, which, by the way, is in the form of a letter addressed by appellant to his atorney, under date of January 2, 1932, he first sets up his proof of loss figures and shows the result, after claiming to have made a correction for the improper classi-

fication of burlap and the improper weight of burlap bale covers. He then sets up a figure purporting to show his loss based on Logie's prices, also showing a correction for the erroneous prices. He then sets up a figure purporting to be based on New York prices, concerning which we had introduced evidence, and makes the correction. He then sets up another figure supposedly based on New York prices, plus freight to San Francisco. He then sets up a figure supposedly based on Bemis prices. He then testifies that he has refigured these items on the basis of the values as testified to by these parties and that his loss is represented by this exhibit. *To say that the temerity of this witness in producing this exhibit is astounding is to express it mildly.* This is particularly true in view of the length of this trial and what we considered a rather thorough cross-examination of the various witnesses. On cross-examination, Mr. Hyland could not remember any of the figures upon which he based his Exhibit No. 165. He could not explain how there was a difference of only $2821 supposedly based on New York prices and the figures in the proof of loss, although there was a differential from 2¢ to 4¢ a yard covering several hundred thousand yards of burlap. (Vol. VI, p. 3294.) Although he had been in court when Taylor testified that their proof of loss claimed $30 a thousand more than the actual selling price for A.B.S. bags, he had given no effect to this in his exhibit because he stated that our witnesses did not testify as to bags. (Vol. VI, p. 3295.) He stated:

> "I have not attempted to check this statement up, Mr. Thornton. No, I did not think it neces-

> sary to bring my work sheets to check this. As for knowing I would be cross-examined in regard to them, *I did not anticipate a cross-examination of this length.* (Mr. Thornton. Q. I do not think you did.) Or I would have brought them." (Italics ours.) (Vol. VI, p. 3296.)

He then made a very interesting admission for a man who has been constantly trying to hide behind his bookkeeper and his adjuster.

> "I certainly was in court when Mr. Griffits testified. * * * I heard Mr. Griffits testify as to prices and *I am just as well qualified as Mr. Griffits. As for my knowing prices and being qualified: I know the burlap market, and I know what Mr. Griffits' organization always did, and what they have been doing for twenty-five years."* (Italics ours.) (Vol. VI, pp. 3296-3297.)

And yet this man has always expressed ignorance of values and could not give any values even during this cross-examination. In the afternoon he brought his work sheets which were introduced as Defendants' Exhibit EE. (Vol. VI, pp. 3303 to 3310.) We shall not unnecessarily prolong this brief by quoting this cross-examination in full, although it more clearly than any other part of the record shows the character of this man. The sheets on which he did the actual figuring he had thrown away, according to his testimony. He then wants to explain a "little misstatement" that he had made in his direct examination, as he stated "unintentionally". Although he had testified that he had figured the various items in the proof

of loss and had arrived at a total of $83,514.54 as per Logie, as a matter of fact he merely picked out certain items and applied what he considered to be Logie's figures, using the proof of loss figures for the balance of the inventory, having Taylor check on three particular items, 36-8 burlap, 40-8 burlap and bale covers. This, of course, was patent on the face of Exhibit 165. As a matter of fact, the only items figured on Logie's prices out of the total of $86,807.98 consisted of ten items involving only $12,461.81. This same thing appears true as to the so-called New York prices and the so-called Bemis prices. Is it any wonder that in his opinion, the court states:

> "The evidence in this case shows that the overvaluation resulted from no such inadvertence but from an intentionally fraudulent attempt to get an excessive award from the insurance companies." (Vol. I, p. 180.)
>
> "Plaintiff attempts to avoid responsibility for any overvaluation on the ground that proofs of loss and the foundations for the claims sued for in this action were prepared by his bookkeeper and accountants hired by him and that he merely signed what was presented to him. I believe the evidence shows that such was not the fact—*that plaintiff knew what was in his factory, and that his claim of loss was overvalued.*" (Italics ours.) (Vol. I, p. 181.)

Is it any wonder that the court, even though reluctantly, finds that plaintiff was guilty of fraud and false swearing? Is it any wonder that, upon motion for new trial based partially on the ground that the

court had not found that this fraud and false swearing was intentional, the court states:

> "In order to avoid any possible misunderstanding, I find that plaintiff was guilty of wilful and intentional fraud and false swearing in making his proofs of loss." (Vol. I, p. 233.)

Truly, the preparation of this Exhibit No. 165 was just as bold and just as amateurish as the attempted burning of this plant.

AS TO THE AUCTION SALE.

Evidence was introduced at the trial, over our objection, relative to an auction sale held on April 22, 1930, and relative to the amount received. The trustee of that sale was W. H. Metson, who appears as of counsel for appellant. The auctioneer was Ben Sugarman, the adjuster for Hyland. By appellant's own admissions, the difference in the value of any burlap between October 19, 1929, and the date of the auction sale, April 22, 1930, was on the later date 16% lower. The court will recognize that the amount realized at a forced sale, or at an auction sale, is no criterion of value. This is particularly true on a falling market where there has admittedly been a decline of 16% in values in a period of six months. Had we attempted to prove the values in the Hyland plant as of the date of the fire by taking the figures realized at this auction sale, on each of the types of material, counsel would have promptly, vigorously and properly objected. Nevertheless, appellant attempts to prove damage to goods

taken from these premises by showing that a certain amount was realized at an auction sale.

Conducted as this sale was, it still shows that there was a remarkably small amount of damage to these goods. According to Mr. Smith's figures, Exhibit UUU, (Vol. V, p. 2723) the actual value of these goods amounted to $66,626.05. He further states, as we have already pointed out, that this value is high as he did not have the correct unit values which were later proved through Logie and Griffits. But, even accepting his figures, we find that applying appellant's 16% drop in value, these goods were worth on the day of the auction only $55,965.82. Even at that they were sold for approximately $38,000. From this appellant deducted auctioneer's fees and other expenses and endeavored to persuade the trial court that these fees and expenses were a portion of the damage suffered by reason of this fire.

An interesting thing in this connection, and one which may account for the fact that this burlap did not bring an even higher price, is that we find that when this merchandise was first moved from Sacramento Street to the Green Street warehouse, the damaged merchandise was segregated from the undamaged.

Sugarman, Hyland's adjuster, and later his auctioneer, mingled these goods. Radford testifies:

> "Mr. Sugarman didn't tell me to move some of the damaged material in with the good material, indicating that it might serve to bring a larger price at an auction sale, *he just moved it in there.*

He moved it in and he told me that was his reason." (Italics ours.) (Vol. V, p. 2581.)

"'Well, I had received instructions from Mr. Smith of just how he wanted that merchandise placed in the building, that he wanted, as I explained, the good and bad separated. I noticed when I went down there in the morning, I don't know how to state this, but I mean I returned there one morning and found that various flats of the damaged sacks and sugar liners had been moved over among the good merchandise; in other words, apparently good piles of sacks had been taken out of their place and the damaged merchandise sprinkled amongst it, that is, the flats.

Q. Did you ascertain who did that, or under whose directions it was done?

A. Yes, I did. *Ben Sugarman said that he had made the change in the merchandise,* that he had placed the damaged among the good for this reason, that he said in his experience conducting salvage sales, that if he sprinkled in a little bad with the good, that the psychology of it was, he thought, that it would bring more money'." (Italics ours.) (Vol. V, pp. 2602-3.)

Smith testifies:

"Q. Do you know whether there was such a segregation at the Baker-Bauer Warehouse?

A. Yes. My orders were partially carried out. They had it lined out the way I wanted it at one time, and then Ben Sugarman re-arranged it; he put some of the fire-damaged stuff in with the other merchandise.

Yes, I did have a conversation with him relative to that. I told him it was our understanding that it was to be segregated. He gave me his reason.

He said he thought it would be better in case they wanted to sell it, it would bring more money if you made it look like damaged merchandise.'' (Italics ours.) (Vol. V, p. 2704.)

Yes, Mr. Hyland and I did have a discussion upon the subject of Mr. Hyland's disposition of the salvaged merchandise. Mr. Hyland told me that he thought that he could sell that stuff, and get $40,000, $45,000, or maybe $50,000 for it on a five per cent commission and *I told him,* as I had told him on all other occasions, *I had nothing to do with it, it was not my merchandise,* he could sell it for $40,000 or $50,000, of course if he did not have use for it he could go ahead and sell it: *I also told him that did not have anything to do with the amount of loss, what he sold it for, because I said, 'If you want to sell good merchandise at a sacrifice, that is a matter for your own consideration and not a matter of the insurance companies' protection,'* and the most of the merchandise, I will say 75 or 80 per cent of the merchandise which was comprised in the inventory could have been run through the factory in the regular course, that is, Hyland would not have had any loss on that portion, and there was no reason why it should be sold at a sacrifice. * * *'' (Italics ours.) (Vol. V, p. 2808.)

Smith was also informed by buyers at this sale that the grades of merchandise were wrong. (Vol. V, p. 2837.)

On cross-examination Sugarman admitted another reason:

''At the time of the sale I believe there were new lot numbers used, not the Radford lot num-

bers. The tags bearing the Radford numbers had not been removed. I am positive of that. The list as supplied to some of the bidders was by Radford number; originally we showed them copies of the Radford inventory, showed them to the bidders, but we sold on a different basis." (Vol. II, p. 1019.)

We then showed him a list which was received in evidence as Defendants' Exhibit Q (Vol. II, p. 1021), showing that all of the Radford lot numbers had been changed at the auction sale.

This court will probably wonder why an auction sale was held. The answer may point directly to the reason for the fire and the type of fire that we found occurring on October 19, 1929, at the plant of the Hyland Bag Company. Within two or three days after the fire Sugarman told Smith that Hyland wanted to get out of the bag business, that Sugarman had fixed up a merger. (Vol. V, p. 2687.) Hyland said the same thing. (Vol. V, p. 2857.) We find that as a matter of fact, before this auction sale Hyland had sold to Pacific Bag Company his entire business of manufacturing domestic bags, and that Hyland himself, prior to this auction, had been employed as General Manager of Pacific Bag Company. (Vol. I, p. 520.) We have also shown that the machinery of the Hyland Bag Company was sold to Pacific Bag Company and removed to their plant. (Vol. IV, p. 2075.) As we have already pointed out, the court visited the premises of the Pacific Bag Company on Monday, January 18, 1932, and saw this machinery. (Vol. VI, p. 3379.)

The mere fact that this appellant, long after his claim against these insurance companies had matured, and after a drop in the market of 15%, elected to sell merchandise 75 to 80% of which was absolutely undamaged, and for which he had no further use due to the sale of his manufacturing business, cannot be considered as proving, or tending to prove the damage sustained to this material by reason of the fire.

AS TO THE LAW OF THE CASE.

AS TO CONSTRUCTION OF POLICIES OF INSURANCE.

The well settled rule of the Federal Courts is that the terms of the policy are the measure of the liability of the insurer, and that to recover the insured must prove that he is within those terms. The court will not consider the reasons for the conditions or provisions of the policy. It is enough that the parties have made certain terms and conditions. The courts may not make a contract for the parties but simply enforce the one actually made.

Imperial v. Coos County, 141 U. S. 452;
Fidelity Union Fire Ins. v. Kelleher, 13 F. (2d) 745 (C. C. A. 9).

It is equally well settled that the terms of the contract may not be established or altered by parol evidence, nor can the court take a shortcut to reformation by striking out a clause of the contract.

Northwestern National Ins. Co. v. McFarlane, 50 F. (2d) 539 (C. C. A. 9);
Fidelity Union Fire Ins. v. Kelleher, supra.

AS TO THE MEASURE OF RECOVERY.

The insurance companies, of course, are not liable in any amount unless damage has actually been sustained to the property by reason of fire. This is well recognized by the Federal Courts.

North River Ins. Co. v. Clark, 80 F. (2d) 202 (C. C. A. 9).

In and by the policies of insurance issued to appellant, it was and is provided:

> "The company will not be liable beyond the actual cash value of the interest of the insured in the property at the time of loss or damage nor exceeding what it would then cost the insured to repair or replace the same with material of like kind and quality." (Vol. I, p. 342.)

While this subject has been considered many times, a recent decision of the United States Supreme Court is interesting. In this case the railroad company delivered coal at Minneapolis, and there was a shortage in the delivery. Such coal could be purchased and delivered at Minneapolis at $5.50 a ton, plus freight, whereas the market price in Minneapolis for like coal sold at retail was $13.00 per ton. In the first trial the District Court gave judgment for the wholesale value of $5.50. This judgment was reversed by the Circuit Court of Appeals and upon retrial the District Court gave judgment for the retail value, which was affirmed by the Circuit Court of Appeals. The Supreme Court of the United States reversed this decision and stated:

> "The test of the market value is at best but a convenient means of getting at the loss suffered.

It may be discarded and other more accurate means resorted to if, for special reason, it is not exact or otherwise not applicable."

Ill. Central R. R. v. Crale, 281 U. S. 57.

AS TO FRAUD AND FALSE SWEARING.

The policies of insurance involved in this action are the Standard Form required by the laws of California, and were adopted in 1909. (General Laws 1909, p. 509.) The provisions of the policy are those adopted by the legislature of this state, are mandatory and are binding on both the assured and the insurer. The policy provides:

"Matters Avoiding Policy. This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or, (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

As a further expression of its intentions and the meaning of this provision, the legislature adopted Section 549 of the Penal Code, which reads as follows:

"Sec. 549. Preparing, etc., false proof of loss. Every person who presents or causes to be presented any false or fraudulent claim or any proof in support of any such claim, upon any contract or policy of insurance or indemnity whatsoever for the payment of any loss, or who prepares, makes or subscribes any account, certificate of survey, affidavit or proof of loss, or other book,

paper, or writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable by imprisonment in the state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

In a case passed on by the Supreme Court of the United States, it appeared that the insured appeared for examination under oath, and made certain statements relative to the acquisition of the property involved. It is stated that there was evidence tending to show that his answers were made not with the purpose of deceiving and defrauding the insurance companies, but in order that he might be consistent with a statement theretofore made to R. G. Dun & Co.

" * * * And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured. A false answer as to any matter of fact, material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and wilfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts. No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false and wilfully made, the fact that they are material is proof of an attempted fraud, because their ma-

teriality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed. 'Fraud,' said Mr. Justice Catron, in Lord v. Goddard, 13 How., 198, 'means an intention to deceive.' 'Where one,' said Shepley, Ch. J., in Hammatt v. Emerson, 27 Me. 308-326, 'has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive.' 'If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law.' Bosanquet, J., in Foster v. Charles, 7 Bing., 105; Polhill v. Walter, 3 B. & Ad., 114; Sleeper v. Ins. Co., 56 N. H., 401; Leach v. Ins. Co., 58 N. H., 245.

* * * * * * *

The fact whether Murphy had an insurable interest in the merchandise covered by the policy was directly in issue between the parties. By the terms of the contract, he was bound to answer truly every question put to him that was relevant to that inquiry. His answer to every question pertinent to that point was material, and made so by the contract, and because it was material as evidence; so that every false statement on that subject, knowingly made, was intended to deceive and was fraudulent.

And it does not detract from this conclusion to suppose that the purpose of Murphy in making these false statements was not to deceive and defraud the Companies, as is stated in the bill of exceptions and certificate, but for the purpose of preventing an exposure of the false statement previously made to the commercial agency in order to enhance his credit. The meaning of that we

take to be simply this: that his motive for repeating the false statements to the Insurance Companies was to protect his own reputation for veracity, and that he would not have made them but for that cause. But what is that, but that he was induced to make statements, known to be false, intended to deceive the Insurance Companies, lest they might discover, and others through them, the falsity of his previous statements; in other words, that he attempted, by means of a fraud upon the Companies, to protect his reputation and credit? In any view, there was a fraud attempted upon the insurers; and it is not lessened because the motive that induced it was something in addition to the possible injury to them that it might work. The supposition proceeds upon the very ground of the false statement of a material matter, knowingly and wilfully made, with the intent to deceive the defendants in error; and it is no palliation of the fraud that Murphy did not mean thereby to prejudice them, but merely to promote his own personal interest in a matter not involved in the contract with them. By that contract, the Companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, wilfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance."

Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 95, 97 (28 L. Ed. 82).

In a case where the insured claimed a total loss to insurance of $30,000, claiming a valuation of the property destroyed of approximately $36,000, and the jury returned a verdict of $17,000, the Appellate Court reversed the judgment of the lower court, holding that this disparity of nearly $19,000 shows on its face that, as a matter of law, the proof of loss was fraudulent. It also holds that where claim was made for approximately $2500 on goods in process, and the evidence shows that as a matter of fact that sum was the contract price the company was to receive for manufacturing goods for others, that there could be no other conclusion than that the statement in the proof of loss was knowingly made for the purpose of getting money from the insurance company that plaintiff was not entitled to, and was fraudulent as a matter of law. In that case the proof of loss was signed and sworn to by the President of the plaintiff corporation.

United Firemen's Ins. Co. v. Jose Rivera Soler & Co., 81 F. (2d) 385.

In another case it was held that where the amount of loss was overstated by some $16,000 or, to express it another way, it was claimed that approximately 5,000 pairs of shoes in excess of what the books of the insured showed could have been in the store, the trial court properly granted a directed verdict. The Appellate Court said:

> "The claim made in the proof of loss *and in the evidence at the trial* is not only false, but so grossly excessive as to value that no other con-

clusion could be drawn than that it was knowingly and fraudulently made." (Italics ours.)

Cuetara Hermanos v. Royal Exchange Assur. Co., 23 Fed. 270, 272. (Certiorari denied. 277 U. S. 590 (72 L. Ed. 1002).)

In another case where the evidence showed the goods were soaked with kerosene but only a very small portion of the goods were completely destroyed, that the insured swore to a value in excess of $43,000 and a loss in excess of $35,000, that an expert appraiser of the Underwriters' Salvage Company estimated the sound value at a little over $22,600, and the total damage at a little less than $12,700, and that the appraiser fixed the sound value of the goods at a little over $26,000 and the damage at a little less than $14,000, the court held:

"The oath as to values in the proofs of loss was not a mere matter of opinion. It was a sworn estimate of value by one having special knowledge of the property made, with the intent that the other party, ignorant on the subject, and with unequal means of information, should rely upon it to his injury. It appeared that this estimate of value was grossly excessive, and *the circumstances surrounding the fire were such as to warrant the conclusion that it was willfully false and fraudulent.*" (Italics ours.)

The court also holds that denial of liability does not waive the breach of conditions relative to false swearing.

Orenstein v. Star Ins. Co., 10 F. (2d) 754.

Where the insured filed proofs of loss claiming that the value of the property destroyed exceeded $12,000, although he had bought it with other property, for $10,000, and none of his witnesses testified to a value exceeding $8,000, the court held that the question of false swearing should have been submitted to the jury.

> "The policy is avoided not only for fraud, but also for false swearing by the insured touching any matter relating to the insurance or the subject thereof, 'whether before or after a loss'. If the condition were against fraud alone, the argument as to reliance by the company might be pertinent; but the condition against false swearing is broken when a false oath is knowingly and willfully made by the insured as to any matter material to the insurance or the subject thereof. It is said in some of the cases that same must be made with intent to deceive or defraud * * * But, as pointed out by the Supreme Court of the United States in Claflin v. Ins. Co., 110 U. S. 81, 95, 97, 3 S. Ct. 507, 515, 28 L. Ed. 76, the intent to deceive and defraud is necessarily implied in the intentional and willful making of a false statement as to a material matter."
>
> *Globe & Rutgers Fire Ins. Co. v. Stallard,* 68 F. (2d) 237, 240.

The court also holds that it is no defense to false swearing that further proofs of loss have been waived by the conduct of the adjuster.

In a case where the Chief of the Fire Department testified that there were four separate fires on three separate floors, and cloth saturated with kerosene was found in different parts of the building, the proof of

loss claimed a value of $24,000 and a damage of $22,000, the jury returning a verdict of $5,000, the court held that the finding of the jury was against the weight of the evidence and reversed the judgment.

Domalgalski v. Springfield, 218 N. Y. S. 164.

Here it appears that two months preceding the fire, insurance on the stock was increased from $30,000 to $180,000, that coverage on fixtures was also increased and that only a month before the fire the corporation took out insurance against loss of profits, that the insured claimed to have had stock on hand in an amount much greater than the merchandise inventory showed, and bills were introduced to show that insured had purchased a large quantity of merchandise and it further appeared that many of these bills were altered and the amounts thereof changed, the court says:

> "Where the evidence is clear and convincing as to the perpetration of the fraud, and there is really no countervailing proof, the court is not to stultify itself by holding that there was any real issue in this case, which requires submission to another jury. Any verdict in favor of plaintiff, in view of the evidence presented in this record, would rightfully be set aside by the Trial Court."
>
> *Demarest v. Westchester Fire Ins. Co.,* 255 N. Y. S. 325, 329.

In a case in Wisconsin the defendant insurance company admitted the policy and the fire but denied that the value of the property was as alleged in the proofs of loss. Evidence was introduced to show that plaintiff made fraudulent entries in his books of account setting up as its original inventory a great

amount of merchandise which did not in fact exist. The policy contained a provision to the effect that any fraud or false swearing by the assured should render the policy void. The fire was a "flash fire" and had the appearance of having been fed by some inflammable liquid. The jury returned a special verdict holding that the plaintiff did not knowingly and falsely represent the amount of the loss to be substantially in excess of the true amount. On appeal the judgment for plaintiff was reversed with directions to change the answer to the special verdict and enter judgment in favor of the defendant, dismissing the action. The court states there was evidence which would warrant a jury in determining the fire was of incendiary origin and which tended to show respondent's profits were not as represented and the claim of damages was excessive. The court held that applying the percentage of profits shown in the income tax return, or during the last few months of the business, would reduce to a marked degree the amount of goods on hand. It also stated that a fire burning evenly and the result of a flash, never developing sufficient heat to destroy any part of the structure in which the fire occurred, and leaving a large amount of goods easily identifiable could not in the nature of things consume a large amount of merchandise in the same room with paper labels, and other like material, without some evidence of the burning. The conclusion, therefore, must be that the goods were not in the building at the time of the fire, and that the respondent knew this and that its proofs of loss were made out with the intention of inducing the insurer to act to its disadvantage. It

held that if the insured knowingly and willfully, and with intent to defraud the insurer, swore falsely in making proof of loss, such act amounted to a fraud upon the insurer.

Liberty Tea Co. v. LaSalle Ins. Co., 238 N. W. 399.

It is also held that false swearing by an agent authorized to make proofs of loss will defeat the rights of the insured under the policy, even though the insured be innocent.

American Eagle Fire v. Vaughan, 35 F. (2d) 147.

In another case the insured's proof of loss set forth a claim showing damages of $73,000. The jury found the loss to be $33,000, and also found that the insured did not falsely state the amount of the loss with intent to defraud the insurer. The court held that these findings were not capable of being reconciled and reversed the judgment. It stated:

> "Under the Wisconsin Standard fire insurance policy, the insured, if he suffers a loss, must honestly state, under oath, the extent of his loss, and give this information to the insurer. He must not make false proofs of loss with intent to defraud the insurer. Although the penalty is heavy and seemingly harsh, it is one way of stopping the presentation of false, fictitious or inflated claims. False and exaggerated claims seemingly go hand in hand with incendiarism. The court should therefore unhesitatingly act to prevent attempted frauds on the part of the insured."

American Home Fire Assur. Co. v. Juneau Store Co., 78 F. (2d) 1001.

AS TO ALLEGED ERRORS PREDICATED UPON THE ADMISSION OF EVIDENCE.

The major portion of the errors assigned in the bill of exceptions consist of the admission of evidence over objection by the appellant. The rule has been well expressed by this court in an opinion by Judge Sawtelle.

> " 'since the rulings of the lower court upon the admissibility of evidence in an equity suit are in no way binding upon us and if wrong do not constitute reversible error * * * it is unnecessary to discuss the assignments of error based upon them.' Johnson v. Umsted (C. C. A. 8) 64 F. (2d) 316, 318; Unkle v. Wills (C. C. A. 8) 281 F. 29, 34."
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> *Strangio v. Consolidated Indemnity & Ins. Co.,* 66 F. (2d) 330, 336.

To the same effect see

Johnson v. Umsted, 64 F. (2d) 316.

AS TO ERRORS RELIED UPON BY APPELLANT.

AS TO THE FIRST ERROR RELIED UPON.

The first error relied upon is that

> "The trial court erred in denying plaintiff's motion for special findings."

Yet appellant admits that the court did make findings, for in subdivision (d) of its first ground of error, it is stated that

> "Many of the findings made by the trial court were not within or not responsive to the issues, or

were upon merely evidentiary matters." (Appellant's Brief, p. 16.)

"Subdivision (c) under the first specification of error is that the court failed to find upon the principal issue of this case. The principal issue in this case arose upon the answer of defendants upon false swearing." (Appellant's Brief, p. 14.)

Yet the court found

"That plaintiff was guilty of fraud and false swearing in connection with his proofs of loss, and the pleadings and testimony in this case, and that his conduct has barred his right of recovery herein * * * The evidence on the phases which I have discussed, being clear and convincing bars plaintiff's right to recover and makes it unnecessary to discuss or find upon the other issues. In view of the discussion of the facts and the law in this opinion, I adopt it as my findings of fact and conclusions of law, and the motions of the respective parties for special findings is denied and exceptions noted." (Vol. I, p. 203.)

The court also holds:

"The evidence in this case shows that the overvaluation resulted from no such inadvertence, but from an intentionally fraudulent attempt to get an excessive award from the insurance companies." (Vol. I, p. 180.)

As we have already pointed out, the court, in denying petition for rehearing, further held:

"In order to avoid any possible misunderstanding, I find that plaintiff was guilty of willful and intentional fraud and false swearing in making his proofs of loss." (Vol. I, p. 233.)

The court thus adopted its written opinion as its finding of fact and conclusions of law. This is a recognized practice. The defenses to the action were fraud and false swearing in connection with the sworn proofs of loss, and also in connection with the complaints filed in the Superior and Federal Courts. There were also denials of the amount of loss claimed by appellant. It clearly appears that the court has found definitely on these defenses. It has found that there was wilful and deliberate fraud and false swearing violating the contracts entered into between appellant and appellees. As the result of such findings, the court, as a conclusion of law, has decided that appellant was not entitled to recover and that defendants were entitled to a decree with costs.

In addition the court has found that the fire was incendiary, and that this was known to appellant. It is also found that there was an over-statement of the amount of loss, which was wilfull and intentional. It is also found "that there was little or no merchandise burned out of sight". (Vol. I, p. 187.) In this connection the court has found that it was not necessary to ascertain the amount of the property, if any, which was burned out of sight as its decision as to fraud and false swearing was determinative of the issue.

In connection with the question of fraud and false swearing the court has also found relative to fraud and false swearing in the testimony at the trial. Naturally, appellees could not anticipate the evidence which would be introduced by appellant and could not set up anticipatory defenses. However, under the

authorities cited under the heading "Fraud and False Swearing" in this brief, we have pointed out that this provision of the policy is also applicable to testimony given at the trial. The court has found specifically relative to this fraud and false swearing, and has enumerated the various instances in which it has occurred, among others relative to the pricing of the inventories introduced by appellant, relative to testimony as to the contents of the building, relative to increasing grading of the goods and relative to changes in records and preparation of fictitious contracts. It is true that in making these findings, the court has stated portions of the evidence introduced which led him to form his conclusions. The careful and able opinion of the trial judge is certainly of very much greater assistance to this court in arriving at a correct determination than would have been set, stereotyped findings to the effect that the allegations of the complaint were untrue, and the allegations of the answer were true, resulting in a conclusion of law that appellees were entitled to a decree. This opinion shows careful study and a thorough understanding of the case. As a matter of fact, it is, in our opinion, remarkable that any trial court sitting through such a lengthy trial could have waded through the mass of testimony and exhibits to arrive at such a clear, concise statement of the most vital issues which had been proved. The trial judge not only had the opportunity to examine the exhibits during the testimony, but he also listened to and observed the various witnesses who were produced by both sides. He is frank in stating that he believed some witnesses and did not believe others.

The trial court had the opportunity of observing the manner of testifying and the apparent evasiveness of many of the witnesses. His observations, of course, cannot be duplicated by this court by either reading that testimony as reduced to cold print, or by reading the briefs of the attorneys for the parties. We believe that the findings of the trial court as set forth in the opinion constitute a compliance with Equity Rule 70½. However, if this Honorable Court finds that the findings, as set forth in that opinion, do not comply with this rule, or that they are inadequate and should be amplified, the rule is very well stated as follows:

> "* * * On an equity appeal where no findings of fact or insufficient findings are made in the court of first instance, the appellate tribunal has power either to send the case back for further disposition or to make findings itself and decree accordingly. Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 179, 20 S. Ct. 336, 44 L. Ed. 417. Inasmuch as both parties had full opportunity to present all their material evidence on this issue and did present proofs sufficient for a finding, we choose to resolve the issue here."
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> *Horwitz v. N. Y. Life,* 80 F. (2d) 295, 302.

> "An appeal in an equity suit invokes a new hearing and decision of the case upon its merits upon the lawful evidence. * * * The reviewing court will, if possible, dispose finally of an equity suit upon the record on appeal and not remand it for further trial in the District Court."
>
> *Johnson v. Umstead,* 64 F. (2d) 316, 318.

This court has had occasion to consider Equity Rule 70½ in a case cited by the trial judge, and upon

which he relied. That opinion was written by Judge Wilbur.

"The rule is well settled, in states where findings are required by law, that it is not necessary to make findings on all defenses wherein findings actually made require a judgment in favor of either party. We do not believe that the Supreme Court intended to extend this rule by Equity Rule No. 70½ so that in every case there must be specific findings upon every issue, regardless of the fact that findings actually made sustain a decree, nor do we believe that it was the intention of the Supreme Court to introduce into equity and admiralty practice the difficulties inherent in the preparation of precise findings upon every material issue involved in the litigation. The rule is evidently intended to advise the courts on appeal of the decision of the trial court as to the material issues. It is obvious that, where the judgment of the trial judge, in determining the controverted issue of fact, is given great weight upon the appeal, in case of conflicting evidence by witnesses who testify in the presence of the judge, the appellate court in exercising its jurisdiction in equity and admiralty cases should be advised of the conclusion of the trial court as to where the truth lies as between witnesses who contradict each other. It may be conceded that in this case and all infringement cases it is a decided advantage to have the views of the trial judge upon the entire question, and particularly in cases of noninfringement the ground upon which the trial court finds noninfringement. The rule does not require this to be done. * * * In these cases the district judge filed an opinion and adopted the

same as his findings of fact and conclusions of law. We see no objection to this course. Until the opinion is adopted by the court as its findings of fact and conclusions of law, it is not a part of the record."

Parker v. St. Sure, 53 F. (2d) 706, 708-709.

This court also passed on the same question in a later case in which appellant also contended that the trial court had made numerous errors in its memorandum opinion. The court states:

"While Equity Rule 70½ requires that 'the court of first instance shall find the facts specially and state separately its conclusions of law thereon', and a literal compliance therewith would be attended with undoubted advantages to an appellate court and facilitate the presentation and consideration of appeals, we think the mere fact that the findings and conclusions—if sufficiently specific and otherwise in compliance with the rule—are set forth in the court's written opinion and adopted by the court as such findings and conclusions, is not such a violation of the rule as calls for a reversal of the decree."

National Reserve Ins. Co. v. Scudder, 71 F. (2d) 884, 888.

In addition, the rule is well settled that in equity actions the judge's findings, supported by substantial evidence, cannot be disturbed on appeal. This court has so held:

"It would serve no useful purpose to set forth the conflicting testimony relating to payment of the mortgage, because after an examination of

the record, we feel bound by the well settled rule that the findings of the chancellor, based on conflicting evidence, are presumptively correct and will not be set aside unless a serious mistake of fact appears."

National Reserve Ins. Co. v. Scudder, p. 887, supra;

McCullough v. Penn Mutual Life Ins. Co., 62 F. (2d) 831.

"As was said by Judge Rudkin, in the case of Easton v. Grant (C. C. A.), 19 F. (2d) 857, 859, 'the appellant is confronted by two well-established principles of law, from which there is little or no dissent: First, the findings of the chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact.' The second principle above referred to has no application here. See, also, Jones v. Jones (C. C. A. 9), 35 F. (2d) 943, and United States v. McGowan (C. C. A. 9), 62 F. (2d) 955, 957."

Collins v. Finley, 65 F. (2d) 625, 626.

"It is true that in an equity case the evidence is reviewed by this court, but it is a fundamental rule that, where the witnesses testify in person before the trial judge he is in a better position to pass upon the credibility of a witness than this court, and we will follow the decision of the trial judge unless it is clearly apparent that his decision is erroneous. Savage v. Shields (C. C. A.), 293 F. 863; Easton v. Brant (C. C. A.), 19 F. (2d) 857; Jones v. Jones (C. C. A.), 35 F. (2d) 943. The court rejected the testimony of

> a large number of witnesses adduced by the government as not worthy of full credit."
>
> *United States v. McGowan,* 62 F. (2d) 955, 957 (C. C. A. 9).

In view of the fact that both parties were allowed opportunity to present evidence at length on all issues, and in view of the fact that the trial judge has passed away subsequent to the decision of this case, we believe that if this court finds that the findings should be differently expressed, it will exercise its prerogative of making those findings rather than send this case back for another lengthy trial which could result in no other decision.

Under the views expressed by the court, any additional findings he might have made would necessarily have been adverse to appellant.

Appellant's complaint that the court has failed to find the amount of appellant's loss, is due, as we have heretofore pointed out, to the fact that appellant has offered no proof as to the amount of loss sustained with the exception of admittedly erroneous reports of accountants purporting to show an apparent inventory. The court has found against those reports, stating:

> "I find that the value of the stock at the time of the fire was approximately $88,000." (Vol. I, p. 178.)

The court also states that the testimony shows that at least 75% of the salvaged stock could be made into new bags (Vol. I, p. 185), and that the testimony of

disinterested witnesses shows that the damage was not in excess of 25%. The court has also stated that there was very little stock burned out of sight, and that if it were necessary for him to determine this amount of out of sight loss he would find it to be the difference between the perpetual inventory, namely, the approximate $88,000 of value which he finds, and the Radford inventory, or approximately $2000. The loss as found by the court, therefore, is susceptible of simple arithmetical calculation. If we take the maximum of $2000 as burned out of sight from the $88,000 of value found by the court, we find a remaining $86,000 which the court finds was damaged not to exceed 25%, or $21,500. This would, therefore, leave a maximum loss of $23,500 as against an original claim of $73,000 and a subsequent claim of $106,000.

The court has not reduced this arithmetical calculation, but it has found that the amount of damage is "so far below even the lowest claim of loss that unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent." (Vol. I, p. 182.)

The court has also found that the claim as to out of sight loss, amounting in one instance to $15,000, and the other to $46,000, cannot be supported, and has stated, as we have pointed out, that if it were necessary for him to determine this amount he would fix it at $2000.

We believe that the points raised under this first assignment of error have been amply covered in our

statement as to facts, the nature of the case, and the evidence produced.

Counsel refers to some of the cases cited by us relative to the question of Equity Rule 70½. He also calls attention to the dissenting opinion of Justice Butler in *Los Angeles Gas & Electric Co. v. Railroad Commissioner,* 289 U. S. 287. It will be noted, of course, that this is not the opinion of the Supreme Court but merely a statement in a dissenting opinion.

As to the case of *Panama Mail Steamship Company v. Vargas,* 281 U. S. 670, which went up from this court, we desire to call the court's attention to the fact that

> "The district court delivered no opinion and made no findings of fact other than such as may be implied from the decree. * * * The decree does not show on what premise of fact or law it was given, but only that it was given on some premise which in the court's opinion entitled the plaintiff to the decree."

Counsel also refers to various sections of Cal. Juris. and authorities to the effect that a defense which is not pleaded cannot be considered. We have no disagreement with these authorities. For instance, in one it is stated:

> "The complaint avers due proof of loss and a compliance with the conditions of the policy in other respects. The answer denies this allegation, sets out the proof of loss made, and points out several alleged defects in it *but does not charge that it is either false or fraudulent.* * * *" (Italics ours.)

It is also stated that there were objections to the proof. The court says:

> "It does not charge that it was wilfully false or untrue, states no facts constituting fraud, and does not claim a forfeiture has been incurred. As there was another apparent reason for giving the notice and for pleading it, I think the answer did not inform the plaintiff that fraud was charged or that a forfeiture would be claimed."
>
> *Greiss v. State Investment etc. Co.*, 98 Cal. 241, 243-244.

The answers in this case charge specifically that plaintiff violated the terms and conditions of the policy relative to fraud and false swearing in respect to statements made in his proof of loss and in the various complaints, and that at the time of making these statements he knew that the same were false and untrue, and that they were made for the purpose of inducing appellees to pay a loss in excess of that sustained.

AS TO THE SECOND ERROR RELIED UPON.

This error is in two parts, first, that the trial court erred in finding "that plaintiff was guilty of fraud and false swearing in his proofs of loss, and that there was over-valuation which resulted from an intentionally fraudulent attempt to get an excessive award from defendant insurance companies"; and, second, that "any defense of false swearing was waived".

The ground of this second error is quite remarkable in view of the fact that the first ground of error assigned is that the court made no finding. We now find appellant complaining because he contends that the court did find he was guilty of fraud and false swearing.

It is claimed that there is no basis for finding fraud in this case. The court has found that "the values in the original proof of loss were padded; they were padded in several pleadings filed in this case and in the attempted proof at the trial", and "that the over-valuation resulted from no such inadvertence but from an intentionally fraudulent attempt to get an excessive award from the insurance companies". The court, in his opinion, points out the evidence upon which he bases such a finding. We have already discussed this evidence earlier in the brief. Even assuming that there is evidence to the contrary, the finding of the trial court based on evidence, even though conflicting, must be sustained. We have already pointed out the law in this respect in our citations under the first assignment of error.

Appellant also contends that "the appellees have never parted with one dollar to appellant herein. They have always resisted appellant's claim, hence it is a necessary conclusion that they have never relied upon and never been injured by any statements or representations of plaintiff * * *". (Appellant's Brief, p. 20.) They then cite certain authorities with which we have no contention. In other words, that fraud without injury is not a defense, or

does not give rise to a cause of action. Appellant overlooks the fact, however, that the defenses relied upon here in this action, and the fraud and false swearing relied upon, are a portion of the contract entered into between the parties. We have already pointed out to the court the law relative to fraud and false swearing.

As stated in the authorities cited by us, the intent to deceive and defraud is necessarily implied in the intentional and wilful making of a false statement as to a material matter, and it is no palliation of the fraud that the insured did not mean thereby to prejudice the insurance companies. The law presumes every man to intend the natural consequences of his act and he cannot be heard to say that he did not expect to be believed. The mere fact that appellant was unsuccessful in his attempt to defraud does not justify the attempt or relieve him from the forfeiture imposed by the contract into which he entered. Again, if this court feels that the finding is too general, it is a simple matter for it to exercise its prerogatives and make a finding which will cover the situation. We do not consider it necessary to discuss the California authorities, as we have already pointed out the Federal authorities covering this situation, and the finding of the court that the fraud was wilful and intentional answers all the points raised in the authorities cited by counsel. We have also discussed at length all of the evidence referred to by counsel.

However, in regard to the contention that plaintiff did not know the facts and relied upon others, we

have not only the finding of the court upon this subject, but we also desire to again call this court's attention to the fact that appellant testified that he knew the figures in the reports of the auditors to be correct (Vol. 1, p. 441); that he always paid attention to Calcutta prices and received cables and telegrams relative to prices sometimes every day, very often oftener than once a week (Vol. I, p. 527); that he was familiar with values on October 19th and on the day when he was testifying (Vol. I, p. 526); that he did all of the purchasing and selling for his company; that he informed adjuster Smith that the grades and prices were 100% right (Vol. V, p. 2754); that he was informed that if he swore to these prices he would vitiate his policy. (Vol. V, p. 2755.) Despite the contentions of appellant, the court has found, and properly so, that appellant did not rely upon his bookkeeper and accountants, but that he "knew what was in his factory and that his claim of loss was over-valued". (Vol. I, p. 181.)

Appellant also sets up some nine grounds showing the general basis of his claim. However, we have already discussed each of these points earlier in this brief, and the best that can be said in appellant's favor is that there is a conflict of testimony which has been resolved against him by the trial court.

Appellant also attempts to show that there was a waiver of any defense of false swearing. In making this contention appellant evidently overlooks the well settled rule of law that in order to rely upon waiver the *same must be alleged and proved.* There is no

allegation, nor has there ever been a claim until this appeal, that there was any waiver of the defense of false swearing.

Kohner v. National Surety Co., 105 Cal. App. 430;

Goorberg v. Western Assurance Co., 150 Cal. 510, 519;

Aronsen v. Frankfort Ins. Co., 9 Cal. App. 473;

Arnold v. American Insurance Co., 148 Cal. 660-668;

Bank of Anderson v. Home Ins. Co., 14 Cal. App. 208, 214.

It is interesting to note that in the brief it is stated:

> "* * * appellees for many months treated the policies as in full force and effect, and by their conduct waived any defense of fraud or false swearing, and the court should have so found." (Appellant's Brief, p. 19.)
>
> "Their conduct at all times was that the contract was in full force and effect and that they were liable thereon." (Appellant's Brief, p. 35.)

But, as strangely inconsistent as appellant is in many instances in the brief, we find under the same assignment of error the following statement:

> "The appellees have never parted with one dollar to appellant herein. *They have always resisted appellant's claim,* * * *" (Appellant's Brief, p. 20.) (Italics ours.)

Which statement are we going to accept? That the appellee always treated the contract as in full force and effect, and that they were liable thereon, or that they always resisted the claim?

AS TO THE THIRD ERROR RELIED UPON.

The claim of appellant is that the court erred in holding "that the heart of plaintiff's contention is that large quantities of goods were burned out of sight, and that unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent."

Counsel for appellant take the position that the use of the word "heart" must mean that this claim was the largest and most important element of the loss, and that such a statement was erroneous as the claim of loss on salvaged merchandise was nearly 80% of the amount claimed in the proof of loss. Incidentally, in this respect it is very interesting to note that appellant objected to the introduction of the proof of loss in evidence, and specifies as their fourteenth assignment of error that the court erred "in overruling plaintiff's objections to the admission in evidence of plaintiff's proof of loss, Defendant's Exhibit A, plaintiff not relying upon said proof of loss and claiming a greater loss than therein stated. Said exhibit details plaintiff's loss of merchandise in total sum of $73,601.96." (Vol. VI, pp. 3390-3391.)

This is particularly interesting as it will be noted that throughout the entire brief, with the exception of

two places, counsel dwells on the figure of plaintiff's claim of loss being $73,601.96, including a claim for merchandise burned out of sight of $15,645.25. This latter figure appears on pages 34, 38 and 52 of the brief. Apparently counsel for appellant are not very happy about the increased claim, which increase is due to claiming that approximately $46,000 worth of merchandise was burned out of sight. Counsel have studiously avoided this figure, and we do not find it mentioned in a single instance in the brief. Their whole argument is based on the original claim and $15,000 out of sight.

We know of no definition of the word "heart" showing it to mean largest or most important. It is often used synonymously with life, but is generally applied to that vital part which when stopped robs the body of life. In that respect, the statement of the court that the heart of plaintiff's contention is that large quantities of goods were burned out of sight is literally true. When we stopped that contention plaintiff's claim and hopes of recovery died.

We have heretofore shown that there is no evidence, outside of deductions from a report purporting to show the apparent inventory, to establish any loss out of sight. We have already treated that subject in detail, showing the inability of plaintiff to make any showing except that *he saw some ashes,* the inability of Mr. Taylor to identify any portion of the $46,000 of out of sight, the inability of Mr. Sugarman to specify any out of sight, and the fact that the report of the accountant indicating a loss out of sight was

entirely due to duplication of purchases. Before proofs of loss were filed, plaintiff and his adjuster were challenged to show anything that was burned out of sight. We repeated these challenges during the trial, and to date there has not been one iota of evidence to show what, if anything, was burned out of sight or totally destroyed. We have also treated the question of debris, showing that as a matter of fact there was no debris representing merchandise, and showing what the result would have been if we accepted the testimony relative to the removal of debris. The trial court was absolutely correct in stating in its opinion:

> "Unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent."

Although counsel for appellant would gladly overlook the figure of approximately $46,000 representing this out of sight merchandise, the evidence produced by appellant on the trial was all directed to sustaining this figure and not the $15,645.25. However, we believe that we have sufficiently pointed out the facts relative to this claim to convince this court that an attempt to recover even this item of $15,645.25 as a claim for merchandise out of sight, was false and fraudulent, and that the action of appellant in attempting to recover either this amount or the amount of approximately $46,000 could only justify a judgment in favor of these appellees.

Counsel cites, on page 44 of his brief, certain authorities to the effect that a mere overvaluation made

in good faith will not defeat a recovery. There is no question that such is the law. However, the merchandise involved in this claim was not of a character which would justify an overvaluation made in good faith. It was merchandise as to which appellant testified he knew the market value. He knew the type of merchandise which he, and he alone, was purchasing, and yet he subscribed and swore to a proof of loss showing merchandise of higher grades and prices than any which he had purchased. He deliberately increased prices by raising the grade of the merchandise, and he also made a claim, *not as he has stated at landed cost, but at retail selling price, plus ½¢ a yard.* This certainly is not a question of honest overvaluation, or the act of an honest man.

AS TO THE FOURTH ERROR RELIED UPON.

The basis of this claim of error is that "the court erred in finding that plaintiff knew what was in his factory and that his claim of loss was overvalued, and that he tried to escape responsibility for any overvaluation on the ground that the proofs were prepared by his employees, and in finding that their knowledge would be imputed to him."

If we were to admit all of the arguments advanced by counsel for appellant under this title, we would still find that appellant was guilty of false swearing during the course of the trial sufficient to void his claim. In this respect we refer to Exhibit 165, made up and prepared by plaintiff himself, and to his testi-

mony relative to that exhibit. This exhibit was produced and testimony relative thereto given by appellant on rebuttal. We have treated it at length under the heading "As to other false swearing by appellant during the course of the trial."

Under our discussion "As to pricing of Radford inventory and proof of loss", we have devoted considerable time to showing plaintiff's knowledge of the claim, his testimony relative to Defendant's Exhibit B, the fact that despite his knowledge of costs and the fact that he personally handled all sales and all large purchases, despite the fact that Sugarman agreed with Mr. Smith that the proof would be priced on replacement value in San Francisco, and despite the fact that appellant was warned that by using the method and prices adopted by him he was vitiating his policy, Hyland stated that "we will take all the chances on that". He proceeded to sign, swear to and present to the insurance companies a proof of loss, for the purpose of collecting a loss which he knew he had not sustained. He knew that that proof of loss, and the complaint subsequently verified by him, were grossly excessive and wilfully overstated. He had been warned that his actions constituted a breach of his contract, and that he would avoid that contract. He preferred to take his chances, and now that the court has found against him on the grounds of fraud and false swearing, he is attempting to hide behind an adjuster and his accountants and his bookkeeper, because he himself did not do the manual work of preparing the instruments which he subscribed and verified. Surely

the court could have made no other finding, and just as surely this court is not going to permit this appellant to resort to such a subterfuge. The parties who did the actual mechanical labor were employed by appellant and by him authorized to prepare these various statements. The result of their work was ratified and verified by appellant. He not only should have known, but did know, the falsity of these claims. To sustain appellant's contention would mean that it would be impossible to enforce the breach of a condition of a contract in the case of a corporation which must act through human instrumentality, or against an individual who has the means, or is smart enough to employ someone else to prepare false statements for his signature.

AS TO THE FIFTH ERROR RELIED UPON.

Appellant claims "the court erred in considering the suspicious circumstances surrounding the fire in connection with the alleged fraud and false swearing."

Counsel would infer that there were no suspicious circumstances in connection with this fire, as is evidenced by the statement in the brief:

> "If there were any suspicious circumstances surrounding the fire * * *". (Appellant's Brief, p. 61.)

These circumstances have been heretofore treated by us and are set forth at length in the opinion of the court. There is not one word of testimony to the effect that appellant knew nothing about these circum-

stances. On the contrary, we have the absolutely uncontradicted evidence of the Fire Marshal and his assistant that they were called to appellant's attention. We also have the testimony that he named three parties whom he considered responsible.

Counsel also states that there is no issue relative to the type of fire. The court will remember that one of our defenses was based on the ground of fraud and false swearing wherein we charged that appellant knew that the fire was of incendiary origin and swore that he had no knowledge or belief as to its origin. In addition to that, the fact that there were a number of separate fires in this building, that there was a great deal of merchandise saturated with kerosene, that there were pans and drums of kerosene scattered throughout the building, and that the fire was a "flash fire", are certainly indicative of a general scheme to defraud the insurance companies and support defenses of fraud and false swearing.

AS TO THE SIXTH ERROR RELIED UPON.

Appellant contends that "the court erred in considering that the amount of insurance carried on the stock was a suspicious circumstance."

We have already discussed in our brief the question of the amount of insurance. We have pointed out that much of this was new insurance, and that previous to a short time before the fire plaintiff had not carried use and occupancy insurance. We have also shown that in the event of a total destruction of the

plant, accepting values as shown by us, appellant would have profited to the extent of $250,000. Surely such evidence is admissible as part of the general scheme to defraud the insurance companies. There would have been no advantage to appellant in putting in a false and exaggerated claim if there had been no insurance for him to collect, or if the insurance had been insufficient to pay such a claim. On the other hand, if a party were charged with burning insured property, surely evidence that the insurance was less than the value of the property, and that instead of profiting by the destruction of the property, the insured would have sustained a loss, would be admissible. It follows also that where an insured stands to make a profit such as that which would have accrued to this appellant in the event of total destruction of the property, the fact that the insurance was of a new type, had been recently placed, and was grossly excessive, was certainly a circumstance when taken in connection with the proof of fraud and false swearing.

AS TO THE SEVENTH ERROR RELIED UPON.

Appellant states that "the court erred in holding that the failure to settle the loss by arbitration was due to the conduct of plaintiff and his appraiser".

It will be remembered that this defendant set up as a separate and distinct answer and defense to plaintiff's amended complaint the provisions of the policy making it a condition precedent to a right of action to submit the question of the amount of loss to ap-

praisement when demanded by the company in writing. This defense also sets up that the appraisement was not had due to the acts of the plaintiff and the appraiser appointed by him, and that this action was commenced before compliance by the plaintiff with the provisions of the policy of insurance regarding appraisement. (Vol. I, pp. 48-50.) The court has found that

> "The whole course of Colbert's dealing with the appraiser appointed by the insurance companies was designed to defeat an appraisement of the loss according to the terms of the policy. * * * due to the conduct of plaintiff and his appraiser, this was not done and this suit was instituted." (Vol. I, p. 202.)

Again, the best that can be said in favor of appellant's contention is that upon a conflict in the evidence the court has resolved the conflict in favor of the appellees.

It is stated that no objection was made to the competency or disinterestedness of appellant's appraiser, and no valid objection existed to him, or if it did exist, it was waived by failure to object. It is true that no objection was made to the appointment of Colbert, who, on the face of things, appeared to be a competent and disinterested party. At the time of his appointment, neither appellees nor the appraiser appointed by them, knew that Colbert was on Hyland's payroll. They did not know that Hyland had such a hold on this man, that he could induce him to cancel and reissue contracts covering the purchase

of burlap, to the detriment of Colbert's employer. They did not know that Hyland was paying Colbert secret commissions. They did not know that Colbert was indebted to Hyland. They did not know that Hyland was splitting with Colbert the profits accruing to Hyland due to the cancellation of contracts and their reissuance at a lower figure. They did not know that Hyland's influence over Colbert was sufficiently great to enable him to obtain from Colbert fictitious contracts, apparently representing the purchase of burlap, in order that Hyland might use these fictitious contracts to establish his claim. Regardless of any question of competency, this certainly shows that Colbert was not a disinterested appraiser. *None of these matters were developed until the trial.*

In their brief, counsel for appellant refer to the correspondence between the appraisers. On the face of this correspondence it might appear that Colbert's letters were consistent with the efforts of an honest and disinterested appraiser, but when we take his course of conduct into consideration, in view of his absolute domination by Hyland, the court was certainly justified in finding that the failure to appraise was due to the actions of Hyland and Colbert.

> "There can no longer be any doubt as to the validity of the appraisal clause in fire insurance policies. The insured, upon seasonable demand, must comply therewith or there can be no recovery. Hamilton v. Liverpool & L. & G. Ins. Co., 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419; Aetna Ins. Co. v. Murray (C. C. A. 10), 66 F. (2d) 289; St. Paul Fire & Marine Ins. Co. v. Eldracher (C.

C. A. 8) 33 F. (2d) 675; Phoenix Ins. Co. v. Everfresh Food Co. (C. C. A. 8), 294 F. 51. *But while the appraisers are appointed by the parties, they are not subject to the control of the parties.* Shawne Fire Ins. Co. v. Pontfield, 110 Md. 353, 72 A. 835, 132 Am. St. Rep. 449; Fritz v. British America Assur. Co., 208 Pa. 268, 57 A. 573. *They are not agents in law and ought not to be in practice. If appraisers were subject to the direction of the parties, the whole proceeding would be a useless ceremony, for if the parties cannot agree upon the loss by direct negotiation (and the appraisal clause is operative only in case of disagreement) they could not agree through agents subject to their direction."* (Italics ours.)

Norwich Union Fire Ins. Soc. Ltd. v. Cohn, 68 Fed. Rep. (2d) 42, 43, 44.

In appellant's brief (page 74), counsel refers to the opinion of the court where it is stated, in reference to Mr. Logie:

> "He said that Mr. Colbert approached him and when Colbert discovered that he believed that a substantial out of sight loss was impossible, he (Colbert) suggested that he decline to serve."

Counsel states, *"Such a situation does not appear in the evidence."* In this connection the printed transcript is not quite so clear as the evidence set forth in the reporter's typewritten transcript. Nevertheless, the following appears in the printed transcript. When asked to relate his conversation relative to acting as an umpire, Logie states that he informed Colbert that

he had been requested to act as umpire; that he knew there were a number of controverted points, and that he would not consent to act unless there was a clear understanding relative to goods claimed to have been burned out of sight and relative to prices; that Colbert told him that he was required to consult in regard to that and later on in the day *Colbert phoned that Logie had better not serve.* (Vol. IV, pp. 2161-2.) Mr. Logie told Mr. Maris that he would act if Mr. Colbert was agreeable to two stipulations. (Vol. IV, p. 2175.) Colbert asked him not to disclose prices to the insurance companies. (Vol. IV, p. 2173.) Colbert told him, after he had taken his questions to him, that he had better not serve. (Vol. IV, p. 2175.) Yet again, counsel for appellant states that there was no evidence to support the court's views and "that in reference to this matter the trial court again demonstrated its antagonistic view toward appellant and argumentatively made a conclusion unjustified by the evidence." (p. 76.)

Counsel argues that the appraisement was waived by the holding of an auction sale consented to by appellees. The provisions of the policy of insurance are that the appraisal must be had and completed within 90 days after the filing of the proofs of loss. (Vol. I, p. 312.) These proofs of loss were filed on the insurance companies on December 26, 1929. Therefore in accordance with the policy conditions, the appraisal to be binding must have been had within 90 days after that date, or approximately the 26th of March, 1930.

The auction sale was held on April 22nd, or approximately a month later. Even if we took the view that Mr. Smith, the adjuster, consented to such an auction sale, such a consent could not act as a waiver of the appraisal when the limit of time for such proceeding had expired approximately 30 days before. We have previously discussed this auction sale and the fact that Hyland told Mr. Smith he had nothing to say about the sale, that Smith would not consent to it, and that he told Hyland if he wished to sell goods at auction sale, it was not in any way binding upon the insurance companies and did not in any way prove the amount of his loss.

AS TO THE EIGHTH ERROR RELIED UPON.

Appellant claims that "the court erred in failing to find the amount of plaintiff's loss as represented by unsalvaged merchandise as distinguished from salvaged merchandise and burned out of sight merchandise."

In this respect appellant states, despite the fact that we find a constant complaint that the court failed to make findings, that "the court found the out of sight loss was approximately $2,000." Let us again repeat the court's statement in regard to this. It is said:

> "I believe that some of the stock was burned out of sight but that the amount was small. *If it were necessary to determine the amount of the out of sight loss, I should find* that it was the differ-

> ence between the perpetual inventory kept by plaintiff as of the date of the fire, and the merchandise removed after the fire and counted by Radford, or *approximately the sum of $2,000.*" (Italics ours.) (Vol. I, p. 185.)

It will be remembered that there is not one word of evidence introduced by appellant to show the value or the kind of merchandise which was burned out of sight. True, in the proof of loss, and in the memorandum, Exhibit B, it shows a contention that over $15,000 was totally destroyed or obliterated. It is also true that the only method of accounting for the $46,000 discrepancy as indicated by the second report of Hood & Strong, is to claim that this was merchandise burned out of sight. We have already pointed out that neither appellant, nor his bookkeeper, Mr. Taylor, nor his accountants, nor his adjuster, Mr. Sugarman, could enlighten the court in any way as to where this merchandise was or of what it consisted. On the other hand, the witnesses produced by appellees showed that there was no out of sight loss. The trial court resolved this question to the effect that the out of sight loss, if any, did not exceed $2,000. Being based on a lack of testimony on the part of appellant, and positive testimony on the part of appellees, there is not even a conflict in the evidence and the decision of the trial court will undoubtedly be sustained by this court. The only attempted proof was as to the question of debris. Again, apparently counsel for appellant has not been able to accept the figures produced, and the claims made at the trial, for he has seen fit to reduce the amount of debris from 100 tons to 70 or 80 tons

claimed to have been hauled away after the fire. The best that can be said for appellant in this respect is that there is a conflict of the evidence which the court has resolved against him. In this respect the court states:

> "As to the quantity and character of the debris there is serious conflict of testimony. In the light of the evidence which I have just discussed *it is incredible that the debris consisted to any large extent of ash or stock burned beyond recognition.*
>
> Not only does the proof show *negatively that there was no substantial quantity of merchandise obliterated by the fire,* but it shows affirmatively that the amounts claimed were fraudulently built up." (Vol. I, pp. 185-6).

In view of the fact that there is a positive finding of the court based on conflicting evidence, this court will undoubtedly sustain the finding of the trial court. We have heretofore discussed the question of debris and have shown the results of appellant's contention in this respect.

AS TO THE NINTH ERROR RELIED UPON.

Appellant claims that "the court erred in finding that the pricing and grading of the merchandise on the Radford inventory was fraudulently padded, and that there was deception as to price or quality, and fraudulent manipulations of records by plaintiff."

We have already discussed at length the question of pricing of the Radford inventory and the raising of

the 36-8 burlap to 36-9 and 40-8 to 40-10. We have also shown that appellant has admitted this change of grades in his Exhibit 165.

In regard to the statements of the court as set forth in the extracts of the opinion on pages 81 and 82 of the brief, we have already pointed out that these statements are amply supported by the evidence. The best that can be said in appellant's favor is that in some instances there is a conflict of the evidence. In view of the fact that the trial has resolved this conflict in favor of appellees, his findings will undoubtedly be followed by this court. As a matter of fact, counsel for appellant admits that "it was a fact that certain merchandise appearing on the Radford inventory was not correctly graded," and yet, as we have shown, Mr. Taylor, under the instructions of appellant, priced these goods knowing that they had no merchandise of that description, putting on them a price as though they actually possessed such merchandise, and at a figure ½¢ in excess of retail selling price.

As we have also shown, appellant signed and swore to the proofs of loss setting forth thousands of yards of material of this description, although he also knew that they had no such merchandise as he made all purchases and sales. We have also shown that in this sworn proof of loss he set forth the replacement value of bags at a figure of $30 a thousand in excess of their selling price. Surely there could be no better proof of fraudulent padding of the price.

As to the contention that there were no manipulations of the records by plaintiff, we have discussed at

length the various stock sheets numbered 2187, 2199, 2200 and 559. We have shown that whereas stock sheets were numbered chronologically, and were dated, the dates on these stock sheets had been changed and they were so manipulated as to attempt to substantiate duplications amounting to an excess of $30,000. Such changes and manipulations could not be other than fraudulent. Again, the best that can be said in favor of appellant's contention is that there is a conflict of the evidence, which has been resolved against him by the trial court who had the opportunity of examining these exhibits at first hand, and of listening to the witnesses on both sides.

As to appellant's contention that the amount claimed by plaintiff would not overtax the factory building, we desire to call to the court's attention that we do not claim that merchandise of the value of $132,000 would have overtaxed the building, or that this building could not have held merchandise representing such a value. It is our claim, and we believe we have heretofore amply demonstrated the same, that to give any effect to appellant's claim that there was 100 tons of debris, or even 70 or 80 tons of debris representing the remains of merchandise totally destroyed or obliterated, the building would not have held this amount of merchandise. In addition we have shown that the debris would have represented obliterated merchandise of a value of approximately $320,000, whereas appellant's highest claim is that there was merchandise of the value of $132,000 in the building as against the figure of $88,000 as shown by his perpetual inven-

tory. We also claim that it has been amply demonstrated and it has been found by the trial court as a matter of fact that the value of the merchandise on the premises at the time of the fire did not exceed $88,000, and that practically all of this merchandise was salvaged. We have also shown, and it has been found by the court, that 75% of the salvaged merchandise was not damaged in any way by either fire or water.

AS TO THE TENTH ERROR RELIED UPON.

Appellant claims that "the court erred in finding that plaintiff ever or at all, repudiated the accuracy of plaintiff's books."

Appellant refers to the following finding of the court:

> "Plaintiff, on the witness stand, devoted most of the first day of the trial to establish the accuracy and completeness of his books. Numerous forms were introduced in evidence which had been devised by him as the careful executive in direct supervision of his business, to follow the materials from receipt through the process of manufacture and sale so that at any time the contents of the factory could be calculated. Subsequently, in the course of the trial plaintiff repudiated the accuracy of these books." (Appellant's Brief, p. 90.)

In the brief it is stated:

> "The record shows that appellant made no statement as to the accuracy of his books, nor did

> he ever repudiate their accuracy. * * * He made no claims or representations in reference to his books, but at all times invited their examination by accountants for appellees." (Appellant's Brief, p. 91.)

We have already pointed out that instead of inviting any examination by appellees or their accountants, appellant threw every possible obstacle in the way of the appellees and refused to permit them or their accountants to examine these books. Even when the court ordered such an examination it was made as difficult as possible for our accountants to have access to these books. In view of this statement of counsel for the appellant, and in view of the fact that it is said it is made "to show the complete error of the viewpoint under which the trial court was laboring when deciding this case", we desire to refer to two statements of counsel which do not appear in this transcript, but which we quote from the typewritten reporter's transcript. As we have heretofore pointed out, we do not like this form of procedure, but in view of attacks that have been made on a judge who has been summoned from our midst, we believe we are justified in calling the court's attention to matters upon which he based statements in his opinion which were known to all the counsel in the case. These statements are made by counsel who did not sit through the trial, and are either based on ignorance or on a deliberate attempt to mislead this court.

> "Mr. Schmulowitz. I may say for the benefit of the Court that it is to disclose to the Court the

comprehensive records that were maintained by the Hyland Bag Company in the prosecution of its business during the year 1929, and that was in full force and effect at the date of the fire, supplemented by other books and records, all of which records have been made the subject of audit on the part of various firms of certified public accountants in order that the Court may ultimately determine the weight to which the audits made by the certified public accountants are entitled. * * * *It is quite natural for counsel to question and for the Court to call upon the plaintiff to explain why, if the plaintiff after a fire files a proof of loss in which he first asks for some seventy thousand dollars odd, does he later come into court and inform the Court that instead of his loss being some seventy thousand dollars odd, that in truth his loss is some one hundred and eight thousand dollars. Now, in order to fully explain that, it becomes in part important to understand the comprehensive system of records that were maintained by the plaintiff at the time of the fire and prior thereto.* Later on there will be disclosed the basis or formula upon which the first proof of loss was filed, the inaccuracies and fallacies of that report will be disclosed to the Court, and the accuracy and the dependable quality of the present claim will be demonstrated by men skilled in the profession of accounting and by actual reference to original records of which these forms are mere exemplars of the records maintained in the office of the Hyland Bag Company.

* * * * * * *

Mr. Thornton. In addition to that I would like to point out this fact: *You will remember we have*

asked for an examination of these very carefully kept books, but so far we have been deprived of any examination.

Mr. Schmulowitz. Evidently the Court thought you were not entitled to an examination at the time you asked for it." (Rep. Tr. pp. 31-33.) (Italics ours.)

Later on, and after we had pointed out the changing and juggling of the records and accounts by this appellant, Mr. Schmulowitz states:

"Counsel says that the books are filled with inaccuracies. I admit it. I proclaim that. I proclaim the inaccuracies. I am not relying upon the books for the simple reason that the books are replete with errors, and being so, is the Court going to decline to go behind those errors in the books?" (Rep. Tr. p. 1077.) (Italics ours.)

Surely the trial court did not refuse to go behind the errors in the books. He went farther and found that the errors and changes in the records were made by or under the direction of the appellant for the purpose of cheating and defrauding these insurance companies. If we have failed to convince this court of these facts, it is due entirely to our inability to properly summarize and brief the evidence, which was absolutely conclusive along these lines. The evidence relative to the forms of records to which the court refers, which covered practically an entire day's testimony, is boiled down in the transcript in this case to pages 262 to 282, inclusive, Volume I. Appellant states:

"These forms were made up by me." (Vol. I, p. 267.)

In regard to their broken bale lots, he says:

"We were always able to account for every yard." (Vol. I, p. 281.) (Italics ours.)

One of appellant's witnesses, and employee, Willis G. Ledgett, testified:

"In the movement of that material records were kept and checked on the various forms in use by the Hyland Bag Company, because it was our duty to check every bale of merchandise that entered the house, because the United States Government checked over our scales and assessed the duty on weights we gave the Government. *Therefore, we knew the weight and the number of every bale that came in the house."* (Vol. II, p. 634.)

We have already shown that Taylor testified that they had fine records from May 31st to October 19th, and that he would say that 99.9% of the information as to the receipt of goods is correct. We shall not attempt to again set forth the testimony as to the inaccuracy of the records or as to changes in them. Nor shall we analyze the testimony of the various accountants relative to these books. Mr. Taylor, after we had pointed out these changes and inaccuracies, tells us that he had not touched the books and that they were not closed until November. (Vol. III, p. 1534.) He further states:

"As to telling you that my books were very inaccurate, well, every man that has handled them has so testified." (Italics ours.) (Vol. III, p. 1579.)

AS TO APPELLANT'S QUERY "IF APPELLANT IS ENTITLED TO RECOVER, WHAT IS THE AMOUNT HE SHOULD RECOVER, AND HOW SHOULD IT BE APPORTIONED?"

To state the situation in slightly different language from that employed by appellant, we desire to state it is equitably unthinkable that the judgment herein should be reversed. Appellant's counsel states that the

> "* * * loss probably lies somewhere in between the amount admitted by appellees and the amount claimed by the appellant, that is, somewhere between $35,000 and $106,000." (Appellant's Brief, p. 99.)

Yet, appellant has never introduced any evidence which would show that he actually suffered loss or damage, or of what that loss or damage consisted. On the other hand, we have affirmatively shown, and the court has decided, that the claim presented was false and fraudulent and made for the purpose of attempting to cheat and defraud these insurance companies. Counsel states:

> "It is to be noted that at the time of the fire appellant had a net worth of $325,000.00 to $375,000.00; that his sales averaged over $2,000,000.00 per year, and that he had unusual bank credits indicating that he was a man of good reputation and standing in the community (V. I, p. 547); he was a director and large stockholder in a local banking institution. (V. I, p. 235.) The decision herein reflecting upon the character of appellant has swept away the work of years and inflicted immeasurable injury upon him as a business man." (Appellant's Brief, p. 95.)

We are indeed glad that appellant has made such a plea. We could have some sympathy with a man of small means and a man of no standing in the community who might attempt to recover a little more than his small loss. The mere fact that this appellant was a director and large stockholder in a local banking institution, and that he was worth in excess of $300,000, certainly does not show he had a good reputation. Many a man has accumulated means by the use of crooked and fraudulent methods. This appellant has been exposed in this one instance. We are indeed glad that this decision of the trial court, with its sweeping indictment of the character of this man, was directed at a person of wealth. It goes far to disprove the current statement that the courts will penalize only the poor and not the wealthy. If appellant did have a good reputation, and if he did have a standing in the community, he should have considered that reputation and that standing before attempting to perpetrate such a fraud as we were able to uncover during the course of this trial.

As to sweeping away the work of years, our evidence shows that as a matter of fact the loss was nowhere near so great as we at first thought, that instead of being somewhat less than $35,000 it was approximately $10,000. The penalty imposed upon this appellant for his fraud, false swearing and perjury is indeed only too small. The boldness of the request that "appellant asks this court to restore both his good name and his purse to him" (Appellant's Brief, p. 96) is in line with the attempted burning of this plant and the attempted defrauding of the insurance companies. The lower court ex-

pressed his reluctance to find that any man could follow the course of action adopted by appellant, and those of us who knew that judge can well realize his reluctance to find that anyone was a crook and a perjurer.

Appellant closes his brief with a prayer that this court "compensate appellant for his loss and vindicate his honor in this community". (Appellant's Brief, p. 99.)

We respectfully submit that this court should affirm the judgment and let this appellant stand forth in this community with the brand which the trial court was forced to put on him as a result of his own fraud, false swearing and perjury.

Dated, San Francisco,
April 17, 1936.

Respectfully submitted,
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No. 7937

United States
Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of HYLAND BAG COMPANY,

Appellant,

vs.

MILLERS NATIONAL INSURANCE COMPANY, a corporation, DUBUQUE FIRE & MARINE INSURANCE COMPANY, a corporation, NATIONAL RESERVE INSURANCE COMPANY, a corporation, MINNESOTA FIRE INSURANCE COMPANY, a corporation, FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, a corporation, THE MERCHANTS FIRE INSURANCE COMPANY, a corporation, WESTERN INSURANCE COMPANY OF AMERICA, a corporation, and NATIONAL LIBERTY INSURANCE COMPANY, a corporation,

Appellees.

Brief for Appellees Dubuque Fire & Marine Insurance Company, a corporation, National Reserve Insurance Company, a corporation, Minnesota Fire Insurance Company, a corporation, and Firemen's Insurance Company of Newark, New Jersey, a corporation.

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Authorities Cited

No. 7937

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On October 19, 1929 the plaintiff-appellant operated a burlap bag factory on Sacramento Street in San Francisco, and on the night of that date—a Saturday—a "set" fire occurred.

The doors and windows were securely locked and kerosene had been placed on the rear first floor, on the second floor, and on the third floor; particularly was the oil poured on the stairway at the second and third floors and the doors up the stairwell from the second to the fourth floor were all opened.

Fortunately, some of the receptacles of the kerosene became air-bound and the skylight not having been opened, there was no draft after the first flash of fire had burned out the available oxygen supply, with the result that the fire burned up the stairwell, flashed over some of the lint attached to the joists and the edges of the burlap piled near the stairway and then died in its own smoke.

Plaintiff and his confidential secretary-superintendent were the last ones in the building; all others had left by approximately 4:00 or 4:30 P. M. These two stayed there until 6 P. M. or later, according to their own admissions.

The insurance companies attempted to adjust the loss. Plaintiff, although ostensibly attempting to aid in the adjustment, did everything he could to prevent a fair adjustment. He notified competitors to give out no quotations; he refused to divulge his own cost prices; he suppressed a physical inventory that had been taken only four days prior to the fire. He forced

the use and occupancy insurance carriers into an appraisement and, by use of false testimony (as we demonstrated in the trial of this case) he secured a large award in that appraisement.

These defendants who are primary insurance carriers on the stock of merchandise demanded an appraisement. He appointed as his "competent and disinterested appraiser" a bribed employee of a competitor whom he had secretly in his pay and who would not agree to any competent disinterested umpire, and he thereby prevented an appraisement.

75% of his stock was undamaged either by water or fire. He mixed this stock, he misgraded this stock, and more than six months after the fire pretended to hold an auction sale, at which most of the stock was sold to one (company of which he had become the manager). The burlap market at that time, due to the depression, had gone down greatly in its prices.

The plaintiff had approximately $88,000.00 of merchandise, mainly burlap, in his factory at the time of the fire. He swore to a proof of loss which placed the amount of his merchandise at $102,000.00, with a loss of over $59,000.00 of damaged goods and over $15,000.00 additional "burned out of sight". Experts are agreed that it is almost impossible to burn a bale of burlap out of sight, even if the fire lasts several days. Of the loose stock of burlap sacks, which would be easier to burn, 99% were accounted for by actual inventory after the fire. Nevertheless, he sued for $76,000.00 loss and thereafter he filed an amended pleading for a

loss of $106,000.00, which latter figure he stated at the opening of his trial he would increase to $107,000.00.

The mere statement of the figures shows that there should be no wonder that the chancellor found fraud and false swearing in both the proofs of loss and the pleadings.

At the end of the trial the chancellor also found one further damning fact. He had listened to the plaintiff testifying personally, he had listened to his carefully coached and prepared witnesses, and he found that the plaintiff was guilty of false swearing during the course of the trial.

This is an equity case with, as the chancellor has phrased it in the opinion, its historic requirement that the plaintiff must come in with clean hands, and yet we find that after four years a tremendous record has been prepared and filed in this court, and a brief has been filed asking for a reversal of the finding that he was guilty of fraud and false swearing, based on a few artificial arguments on technical points! The brief is almost devoid of any statement of facts and does not pretend to state the facts fairly or what facts were in conflict in the evidence. We submit that the brief does not even have the merit of being technically correct, least of all meriting a reversal where the plaintiff has been guilty of fraud and false swearing.

The plaintiff-appellant prevented an arbitration and appraisal by his failure to appoint a competent, disinterested appraiser and by thereafter blocking the appraisal by a refusal to agree to a competent, disin-

terested umpire, and he is barred from even bringing this action, an appraisement being a condition precedent to the filing of suit (Tr. Vol. I pp. 311; 314).

The plaintiff-appellant was charged with being guilty of fraud and false swearing in his proofs of loss and in his pleadings (Tr. Vol. I p. 44). If this was true there was an end to his case because the California standard form policy provides (Tr. Vol. I p. 305):

> "This entire policy shall be void * * * (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject matter thereof, *whether before or after a loss.*"

The chancellor found that the appellant was guilty on both charges as pleaded, and in addition thereto found that the plaintiff was guilty of false swearing during the course of the trial. Unless the chancellor has committed palpable error, this court has stated that it will not interfere with such finding where it is sustained by the evidence.

> *National Reserve Insurance Company v. Scudder,* 71 Fed. 2d 884:
>
> "It would serve no useful purpose to set forth the conflicting testimony relating to payment of the mortgage, because after examination of the record, we feel bound by the well settled rule that the findings of the chancellor based on conflicting evidence, are presumptively correct and will not be set aside unless a serious mistake of fact appears (citing numerous cases)."

The trial consumed nearly three months, and the case was tried with such meticulous care that the evidence was voluminous both in testimony and in exhibits. During the course of the trial the chancellor personally visited the building and observed that the building proper was not damaged by the fire—the fire having been mainly confined to the stairwell where there was no merchandise. A few feet distant from the stairwell even the original furring on the rough joist as left by the saw at the mill was unscorched.

After the trial the chancellor devoted almost one solid month to the review of the record and to the preparation of his opinion deciding the case—Judge McCormick having been assigned to sit in his stead during that time. His opinion is lengthy and occupies thirty pages of the record (Tr. Vol. I pp. 174 to 204). The statement of the 8th Circuit Court of Appeals in

Klabe v. Lakeman, 64 Fed. (2d) 86,

is particularly appropriate:

> "The findings of fact seem to give a very clear picture of the situation. The trial court evidently gave very close attention to the facts in this case, and made a personal inspection of the property and its surroundings. * * * The findings of fact made in an equity case are, of course, not conclusive on an appellate court, but where there is conflicting evidence they are regarded as presumptively correct and will not be disturbed unless a serious mistake of fact appears. This is the rule of this court. (Citing numerous cases)."

The same rule is again stated in

Coats v. Barton, 25 Fed. (2d) 813:

> "The clear and exhaustive opinion of the court below, which occupies twenty-three pages of the record before us, evidences the care and patience with which he discharged his duty. * * * He heard the testimony and received all the evidence in this case, he enjoyed a far better opportunity than we can have to judge of the reliability of the witnesses and the truth of their statements, and it is an established rule of equity practice that, where in a suit in equity the chancellor, as in this case, has considered conflicting evidence, and made his findings and decree thereon, the presumption is that they are correct and, unless the appellant makes it clearly appear that an obvious error of law has intervened, or a serious mistake of fact has been made in the consideration and decision of the issues in the case, that adjudication will not be disturbed. (Citing numerous cases.) * * * We * * * are convinced that no influential error of law has intervened and that no serious mistake of fact was made by the chancellor below in the hearing and decision of this case and his decree must be affirmed."

We will show that the findings of the chancellor in the instant case were not only justified by the evidence, but that any other conclusion than that the appellant was guilty of fraud and false swearing could not reasonably be made in view of the overwhelming weight of the evidence showing that palpable fraud and false swearing were indulged in by the appellant.

Appellant first addresses himself in his brief to the technical contention that the findings and decree of the trial court are not in accordance with Equity Rule 70½. He pretends to believe that he cannot tell what the findings of the court are and argues that the findings of fact are not clearly and distinctly stated. As he gives this the preferred and important position in his brief we will answer it first.

I.

THE OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE OF THE TRIAL COURT ARE IN ACCORDANCE WITH THE RULES PRESCRIBED IN EQUITY AS APPROVED BY THIS COURT.

The opinion of the trial court (reported at 58 Fed. (2d) 1003) (Tr. Vol. I p. 174) was adopted by the chancellor as his findings of fact and conclusions of law, citing as his authority for so doing the decision of this court in *Parker v. St. Sure,* 53 Fed. (2d) 709, where the same objection was raised and a mandamus was sought to compel more specific findings than contained in the opinion. This court there said:

> "It is not necessary to make findings on all defenses wherein findings actually made require a judgment in favor of either party. We do not believe that the Supreme Court intended to extend this rule by Equity Rule No. 70½ so that in every case there must be specific findings upon every issue, regardless of the fact that findings actually made sustain a decree, nor do we believe

> that it was the intention of the Supreme Court to introduce in equity and admiralty practice the difficulties inherent in the preparation of precise findings upon every material issue involved in the litigation. * * *
>
> In these cases the District Court filed an opinion and adopted the same as its findings of fact and conclusions of law. We see no objection to this course. * * * We are not in this case facing an entire absence of findings. We are also of opinion that the findings in question are sufficient."

This court further said in the later case of *National Reserve Insurance Co. v. Scudder,* supra (p. 888):

> "We think the mere fact that the findings and conclusions—if sufficiently specific and otherwise in compliance with the rules—are set forth in the court's written opinion and adopted by the court as such findings and conclusions, is not such a violation of the rule as calls for a reversal of the decree. * * * In the instant case we think the findings and conclusions on material issues substantially comply with the rule."

The opinion of the trial court in the instant case contained findings upon all of the material issues necessary to determine that plaintiff-appellant herein was without right of recovery. The opinion of the chancellor need only be condensed to its findings to see that it complies entirely with the above rule laid down by this court.

CHANCELLOR'S OPINION CONDENSED TO SHOW SUCCINTLY THE FINDINGS OF FACT.

(The language of the opinion is quoted verbatim; number designation only being added.)

(*A*) *The Issues:*

(1) "All defendants plead certain special defenses which may be grouped under two heads: First, that plaintiff swore falsely as to his knowledge and belief as to the origin of the fire;

(2) And second, that plaintiff was guilty of fraud and false swearing in connection with his proofs of loss and claims of loss in the pleadings in this action.

(3) The five companies writing the $50,000.00 of insurance plead the additional defense that an appraisement of the loss was not had under the terms of the policy due to the acts of plaintiff.

(4) The Western pleads the additional defense that its policy is for damage in excess of $50,000.00 and that the loss was less than that amount.

(5) The National Liberty, in accordance with its prayer for reformation, pleads that it is only liable if values were in excess of $100,000.00 and for damages in excess of $100,000.00."

(*B*) *Finding of Fact:*

(1) "Considering the first defense, the evidence clearly shows that this was a 'set' fire and that plaintiff knew it when making his proof of loss. (Tr. Vol. I p. 175)".

"The policy required the assured to state in the proof of loss his knowledge and belief as to the origin of the fire. Plaintiff stated therein that

the origin of the fire was unknown to him. * * *" (Tr. Vol. I p. 179).

(2) "The principal defense relied upon by all of the defendants was that plaintiff was guilty of fraud and false swearing when making his claim as to the extent of his loss. * * * It is set up in the separate defenses that there was fraud and false swearing,

First, in making proof of loss in the sum of $73,601.96;

Second, in claiming loss in the sum of $76,498.62 in the original complaint in this action; and

Third, in claiming loss in the sum of $106,992.83 in the amended complaint.

Finally, (fourth), it is claimed in the argument that plaintiff's right to recover is further barred by his false swearing during the trial of this case." (Tr. Vol. I pp. 179-80).

(3) "I find the value of the stock at the time of the fire was approximately $88,000.00". (Tr. Vol. I p. 178).

"The evidence in this case shows that the overvaluation resulted from no such inadvertence but from an intentionally fraudulent attempt to get an excessive award from the insurance companies. (1) The values in the original proof of loss were padded; (2) they were padded in the several pleadings filed in this case; and (3) in the attempted proof at the trial". (Tr. Vol. I p. 180).

"I believe the evidence shows * * * (1) that plaintiff knew what was in his factory, and (2) that his claim of loss was overvalued; (3) in any event, under the circumstances of this case the knowledge of his agent would be imputed to him". (Tr. Vol. I p. 181).

(4) "Unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent."

(a) "By stock burned out of sight I mean merchandise which has been burned to an ash or into such small particles that it might be washed away by streams of water or swept into the debris. Merchandise is not burned out of sight when it may be identified as to quality and approximate previous quantity". (Tr. Vol. I p. 182).

"It is difficult to burn burlap when piled or baled. If baled it is practically impossible to burn it out of sight". (Tr. Vol. I p. 183).

"No great damage was done to the building or to the machinery". (Tr. Vol. I p. 183).

"At the end of twenty minutes all but four of the companies were sent away. The water tower never went into action. * * * From the evidence as to the extent of damage to the building one would infer that the damage to the stock would not be great. The testimony of the chiefs was that the fire in the stock was not extensive and that probably none was obliterated by fire. * * * If it was necessary to determine the amount of the out of sight loss I should find that it was the difference between the perpetual inventory kept

by plaintiff as of the date of the fire and the merchandise removed after the fire and counted by Radford, or approximately the sum of $2,000.00". (Tr. Vol. I pp. 184-5).

(b) "Much of the merchandise in the factory was undamaged by fire, water or smoke. * * * As to the quantity and character of the debris there is serious conflict of testimony. * * * It is incredible that the debris consisted to any large extent of ash or stock burned beyond recognition". (Tr. Vol. I p. 185).

(5) (a) "We find that the books show a value at the factory of $89,383.00. Strikingly similar is the value shown by the perpetual inventory or summary of stock sheets kept by Taylor, plaintiff's accountant. Taylor denied ever having had such a document. * * * A summary was made of it by Mr. Hart. * * * And it is from his work-sheet that we know the total of $88,272.55, only $1111.00 less than the book values. * * * The proof of loss based on Radford's account made after the fire shows values at the factory after the fire of $86,816.00". (Tr. Vol. I pp. 186-7).

"Reference has been made to Radford's account or inventory. He was employed * * * to inventory all of the stock in the factory after the fire which could be identified in order that its pre-fire value could be fixed. * * *

(b) "The fraudulent padding commenced with the pricing and grading of this inventory. * * * Radford was not a burlap man and had one of plaintiff's employees give him the grades of the stock. Taylor, who priced the inventory,

admitted on cross-examination that he knew that the grades were raised and that there were no such quantity of certain high grades of burlap in the factory at the time and that the mistake in grading added some $6,000.00 to the values. * * * The evidence shows that Radford was either deliberately misled as to grades or that the mistake was permitted to remain with full knowledge that it was there". (Tr. Vol. I pp. 187-8).

(c) "There was a deliberate deception as to price. The inventory was priced according to the Bemis so-called large quantity price list. This was actually a retail price list for use by the Bemis Company's salesmen". (Tr. Vol. I p. 188).

(d) "Not only did plaintiff use the retail price, but he attempted to suppress quotations as to price from other dealers and succeeded in suppressing them and withheld information as to his own costs". (Tr. Vol. I p. 189).

(e) "Plaintiff first testified that the inventory had been priced at landed cost but admitted under cross-examination that this Bemis price list was used. Plaintiff's adjuster testified that the matter of replacement values was left to plaintiff who was, according to his own testimony and that of others, a shrewd buyer and knew burlap prices thoroughly. He nevertheless used a price from two to four cents a yard higher than the prices at which he could have replaced his materials". (Tr. Vol. I p. 189).

(6) (a) "Plaintiff's original claim of loss was predicated upon values in the factory before the

fire of $102,453.23. Deducting from this the valuation of Radford's inventory of $86,807.98, the out of sight loss was claimed to be $15,645.25. * * * The total valuation was based upon the first Hood & Strong report prepared in late November 1929. This report was based on data flagrantly insufficient.

(1) Plaintiff failed to give the accountant an inventory and balance sheet prepared by Ernst & Ernst as of May 31, 1929, which according to accounting practice should have been the starting point of the calculations,

(2) the perpetual inventory kept by Taylor,

(3) and certain physical inventories taken shortly before the fire. * * * What I have said * * * establishes that the claim of $15,000.00 worth of goods obliterated as well as a subsequent claim for a larger amount were alike fraudulently excessive". (Tr. Vol. I pp. 190-1).

(b) "There was lack of good faith in fixing the proportion of loss on the salvaged goods * * * disinterested witnesses have testified that this merchandise was damaged not in excess of 25%. Yet a loss of $53,586 was claimed in this". (Tr. Vol. I p. 191).

(7) "The amended complaint in this action and the additional claims advanced at the trial are based upon the second Hood & Strong report and supplements thereto. * * *

(a) Defendant has established that at least $41,361.12 should be deducted from the values claimed because of duplications. * * *

(b) The claim of approximately $46,000.00 in merchandise values burned out of sight is largely accounted for by demonstrated duplications amounting to more than $41,000.00". (Tr. Vol. I pp. 191-2-3).

(8) "In connection with the contents of the building before the fire, examination must be made of plaintiff's testimony at the use and occupancy hearing as to the contents of the second floor. * * * He had there testified with some particularity that prior to the fire the second floor was filled with merchandise and in general described the quantity and type. In the course of his cross-examination he in effect adopted the testimony given at that hearing. * * *" (Tr. Vol. I pp. 193-4).

(a) "The evidence is therefore properly admissible to impeach the plaintiff.

(b) It is further admissible generally as proof of another fraud or fraudulent representation of the same character committed at or near the same time to show intent or knowledge. * * *

(c) His padding of values at that hearing and his conduct with reference to the claims of loss involved in this case warrant the inference that the frauds are part of a general scheme or purpose to defraud". (Tr. Vol. I p. 195).

(d) "The quantities of merchandise which plaintiff testified were on the second floor of the factory at the U. & O. hearing were greatly exaggerated. Defendants have prepared an exhibit to demonstrate the physical impossibility of the truth of this testimony. * * * All estimates of

quantity are but approximations but the one in question is so far removed from the possible contents that it is incredible that a man in plaintiff's position should have offered it in good faith". (Tr. Vol. I pp. 195-6).

(9) "The policies in question provided that if the company and the insured failed to agree as to the amount of the loss, the company may demand an appraisement. Each party shall name a competent and disinterested appraiser and they shall in turn select an umpire. * * * It is contended that the failure to agree upon the appointment of an umpire and to reach an appraisement is due to the fact that Colbert, who was apointed by plaintiff as his appraiser, was not disinterested. * * *

(a) The vice in appointing Colbert lay in the fact that his connection with plaintiff was secret and tainted with fraud. * * *

(b) Plaintiff was a large customer of Colbert's employers and his business interests were adverse to theirs but plaintiff nevertheless had Colbert in his pay. * * *

(c) These entries have not been satisfactorily explained by plaintiff, and his own records, therefore, show that the man he appointed as an appraiser was in fact a bribed employee of a firm with which he had extensive dealings. * * *

(d) Not only was Colbert induced by plaintiff to betray the interests of his emyloyer, but the evidence shows that plaintiff used Colbert as a tool in his attempt to get an excessive award for his loss at the U. & O. hearing. This was attempted by the use of the so-called fictitious

Newhall contracts. A month or two after the fire Colbert furnished plaintiff, at the latter's request, with contract blanks of the Newhall Company and plaintiff filled them out as to quantities, description and prices, Colbert stamping or signing the contracts and checking the prices to ascertain that they were approximately correct. These contracts called for the delivery of some 2,400,000 yards of material at a cost of $185,325.00. * * * (Tr. Vol. I pp. 198-9).

(e) Plaintiff contends that they were actual contracts; Colbert testified that they were made up to be cancelled and were cancelled. * * * The records of Newhall Co. show that they were unquestionably fictitious. In the face of the evidence, plaintiff's contention that these contracts were valid is incredible". (Tr. Vol. I p. 199).

(f) Colbert testified * * * after the commencement of this trial plaintiff approached him saying the prices on these contracts were too low and asked him to negotiate new contracts to be substituted for them. Colbert supplied him with new blanks, the contracts were made up, were signed and cancelled in Colbert's presence and taken away by plaintiff. I believe Colbert's testimony as to this transaction". (Tr. Vol. I pp. 199-200).

(10) "The incident of the fictitious contracts, in line with many others discussed in the course of this opinion certainly shows bad faith on the part of plaintiff, and the evidence suggests that plaintiff is responsible for the failure to settle the loss by arbitration.

(a) The admission of the evidence as to these fictitious contracts has been objected to by plain-

tiff. This evidence is properly admissible upon three grounds:

First, it is admissible to characterize the relationship between plaintiff and the appraiser appointed by him and show the appraiser was not only not a disinterested one, but that he was fully cooperating with plaintiff in his fraudulent scheme. If plaintiff did not want a settlement of the loss by arbitration, his appraiser could be counted upon to block it.

Second, it is admissible as evidence of a substantially contemporaneous fraudulent act of plaintiff for the same reason and upon the same authority that plaintiff's testimony at the U. & O. hearing was admissible. * * *

Third, like the testimony at the U. & O. hearing it is also admissible to impeach plaintiff. Plaintiff testified as to the price of burlap on his direct examination and gave prices materially higher than those called for by the contracts. * * * These contracts called for deliveries during October and November, and, had they not been cancelled, and were actual contracts, would have enabled plaintiff to replace all of the materials of that type which he claimed had been destroyed with the burlap covered by these contracts.

Fourth, furthermore, the prices varied but slightly from the prices given by experts called by defendant and corroborated their figures. The evidence is relevant to the question of price and it was proper to use them to impeach plaintiff's testimony on that point". (Tr. Vol. I pp. 200-201).

(11) The whole course of Colbert's dealing with the appraiser appointed by the insurance companies was designed to defeat an appraisement of the loss according to the terms of the policy. * * * Finally, a man was agreed upon by the appraisers who is an expert in the burlap business and who is conceded to be a man of unquestioned fairness and integrity. * * * When Colbert discovered that he believed a substantial out of sight loss was impossible, he (Colbert) suggested that he decline to serve as umpire". (Tr. Vol. I p. 202).

(a) "* * * I believe that a loss of this type should be settled by arbitration. * * * Due to the conduct of plaintiff and his appraiser this was not done and this suit was instituted". (Tr. Vol. I p. 202).

(b) "Compliance with the arbitration clauses in these policies is a condition precedent to a suit upon the policy". (Tr. Vol. I p. 197).

(12) "I have discussed with some detail the evidence which I believe supports my finding that plaintiff was guilty of

1. Fraud and false swearing in connection with his proofs of loss,
2. and the pleadings
3. and testimony in this case,
4. and that his conduct has barred his right of recovery herein". (Tr. Vol. I p. 203).

In the face of these specific findings of the court, the claim of appellent that he cannot determine there-

from wherein he is found to be guilty of fraud and false swearing is both ridiculous and pitiful. From these findings it appears that the appellant planned and executed a definite scheme for his unjust enrichment by reason of the fire which fire was, as the court finds, known to appellant to be a "set" fire. The burlap trade is a restricted trade, there being only a few dealers in the wholesale trade, and the court finds that the appellant suppressed quotations of prices from other dealers and also suppressed his own costs for the goods on hand.

He next, so the court finds, by his own employees graded the merchandise being inventoried, and these employees misgraded the merchandise to a higher grade.

The court then finds that plaintiff had his accountant price this merchandise, and this accountant admits that in pricing the merchandise for the higher grades thus given in the inventory he knew that there were no such amounts of those grades of merchandise in the house. No suggestion is made by appellant why these employees should have done such a dishonest thing except at the direction of the appellant.

Furthermore, the appellant admitted, and it is so found that, although he was an expert on pricing merchandise, that he did not use his own costs but took a retail price list published by a competitor for the use of their own salesmen and added to that his overhead expenses, with the final result that he knowingly and consciously swore to a proof of loss that was from two

to four cents a yard higher than the merchandise cost him. As the price per yard mostly ran between six and ten cents per yard, it results that the valuation placed on the goods by plaintiff had a tremendous error in percentage and amount.

Furthermore, the finding is that he deceived the certified public accountant whom he called in to purportedly audit his books. He had a perpetual inventory kept by his accountant which he suppressed and later refused to produce at the trial—even denying its existence, although several witnesses testified to its existence. He suppressed the physical inventory taken October 15, four days before the fire. An inventory had been taken by another firm of accountants on May 31, 1929, and when he called in the second firm of accountants after the fire they not only did not have the benefit of the perpetual inventory and other physical inventories taken just before the fire but he secured a duplication of over $41,000.00 in his stock by changing the dates on the stock cards that had already been inventoried by the prior firm of accountants on May 31st. The dates on these cards were changed from prior to May 31st to June of 1929 and this stock was then counted by the new accountants as stock received after the prior inventory.

The attempt of appellant to claim that this was not his doings but was merely the mistakes of his accountants is, as the chancellor says in his findings, "incredible". The chancellor has found that the goods on hand at the time of the fire was $88,000.00 and that 75% of this stock was not damaged by fire and

that $2,000.00 was all that was burned out of sight. In other words, of the damaged and burned out of sight stock there was only $22,000.00, less any salvage that could be obtained for the damaged stock. The loss therefore was, and was well known to the plaintiff to be, less than $22,000.00. In his very first sworn proof he claimed $53,586.00 loss on salvaged stock, $6,000.00 more on miscellaneous merchandise and $15,000.00 for stock burned out of sight. No wonder the trial court found that no such claim could be made in good faith and without the plaintiff knowing that he was swearing to that which was false. It was, as the chancellor termed it, "incredible" that plaintiff could have been acting in good faith.

In the amended complaint, after "values" had been built up by palming off altered records on his accountants, he swore to a loss of $106,000.00 in spite of the fact that he knew that the total amount of merchandise in his factory was approximately $88,000.00 and that 75% of that was not damaged.

Plaintiff's attempt to explain away the facts and the judgment against him in this case by urging a technical objection to the findings and decree does not even have the merit of being based upon a good technical objection. As we have shown above, it is demonstrably in error.

II.

PLAINTIFF IS NOT ENTITLED TO RECOVER BECAUSE HIS POLICIES WERE VOIDED BY HIS FRAUD AND FALSE SWEARING.

We shall show hereinafter that the evidence overwhelmingly demonstrates plaintiff was guilty of fraud and false swearing—in his proofs of loss, in his pleadings, and at the trial. The policy of insurance provided (Tr. Vol. I p. 305) that the entire policy shall be void if the insured is guilty of fraud or false swearing touching any matter relating to his insurance or the subject matter thereof, whether before or after a loss. This provision has been wholeheartedly supported by the courts. It not only is entitled to support because it is a valid contract between the parties, but it is the policy form provided by law, and is entitled to support because it represents a sound public policy. Among the many cases which might be cited we will cite the following, most of which were cited by the chancellor in his opinion:

Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 3 S. Ct. 507, 28 Law Ed. 76;

Columbian Ins. Company v. Modern Laundry, Inc. (C. C. A. 8) 277 F. 355, 360, 20 A. L. R. 1159;

Atlas Assurance Co., Ltd. v. Hurst (C. C. A. 8) 11 F. (2d) 250;

Mazzella v. Hanover Fire Ins. Co., 174 S. E. 521;

Follett v. Standard Fire Ins. Co., 77 N. H. 457, 92 A. 956;

Liberty Tea Co. v. LaSalle Fire Ins. Co. (Wis.) 238 N. W. 399.

In the *Claflin case,* supra, the Supreme Court said:

> "A false answer as to any matter of fact material to the inquiry knowingly and wilfully made with intent to deceive the insurer would be fraudulent. If it accomplished this result, it would be a fraud effected; if it failed it would be a fraud attempted. * * * No one can be permitted to say, in respect to his own statements upon a material fact, that he did not expect to be believed."

In the *Columbian Insurance Co. case,* supra, Justice Sanborn, speaking for the court, said:

> "Where the insured knowingly and wilfully makes a false statement of or regarding a material fact in its proof of loss, or in its testimony regarding the value of the property insured, or the loss or damage thereto by fire, the intention to deceive the insurer is necessarily implied as the natural consequence of such act."

The findings of fact are really more detailed than was necessary. The chancellor need only have made his finding that the plaintiff was guilty of fraud and false swearing. It was not necessary that he make many other findings on issues raised, but he did so. However, having explicitly found that the plaintiff was guilty of fraud and false swearing in his proofs of loss, in his pleadings and at the trial, there was an end to plaintiff's case.

Parker v. St. Sure, 53 Fed. (2d) 709.

III.

PLAINTIFF INTENTIONALLY SWORE FALSELY AS TO THE GENERAL DAMAGE DONE TO THE BUILDING, MACHINERY AND STOCK OF MERCHANDISE AS A "BACKGROUND" FOR HIS CLAIM OF A LARGE LOSS ON HIS STOCK.

To show that great damage had been done to his stock plaintiff testified specifically to the tremendous amount of damage done by the fire to the building, to the machinery in the building, and to the stock. He testified in greatest detail about all of these facts —to the damage caused by fire and water—particularly to the great amount of stock that was burned (Vol. I p. 466 et seq.) These details included stock that was partly burned and also to a great amount of ashes present.

In order to make out a large claim of damage to his merchandise stored in the basement, where it is conceded there was no fire, plaintiff testified that there was from 18 to 24 inches of water in the basement immediately after the fire (Tr. Vol. I p. 466). Such an amount of water in a large basement would constitute a miniature lake of tens of thousands of gallons. It is directly contrary to the testimony of all disinterested witnesses, as we shall show.

On the other hand, he had a poor memory for anything that he considered detrimental. He denied that he smelled kerosene (Vol. I p. 464), he denied that kerosene was called to his attention by the Fire Marshal (Vol. I p. 480), he denied seeing either of two drums of kerosene on the third floor, and denied even

seeing a pan filled with kerosene on the second floor (Vol. I p. 490). He admitted that Sullivan, Assistant Fire Marshal, called his attention to "some pans there" (Vol. I p. 490):

"Q. And that is all?
A. That is all.
Q. You are quite positive of that?
A. Quite positive."

He finally admitted (p. 494) that the Fire Marshal did call his attention to the kerosene but "I did not detect any odor of kerosene there at all". Again he stated (p. 495):

"I didn't smell any coal oil and didn't tell him that I smelled any, nor did I tell him that I saw any."

He further positively testified that he never accused anyone of having set the fire or that he thought the fire must have been set (Tr. Vol. VI pp. 3243-4).

We will show by quotations from the testimony of disinterested witnesses that this testimony is absolutely false.

First, as to the extent of the fire. In addition to testimony by various witnesses having to do with the adjustment of the loss, there were numerous witnesses who testified as to the extent of the fire. We will particularly call the court's attention to the testimony of Chief O'Neill and Chief Mahoney of the Fire Department, of Fire Marshal Kelly and Assistant Fire Marshal Sullivan, and of Lieutenant McCarthy,

George C. Lee, William Lee, H. Payton of the Underwriters Patrol.

Chief O'Neill, who was there within two minutes after the alarm was sounded (Vol. IV p. 1830) immediately went up the side of the building to the top, looking at each floor as he went by. He had the skylight broken in in order to give a vent out of the top, or fourth floor. There was some smoke there but no flame, but he later saw some in the stairway. He then went to the third floor where they "killed" the fire in five minutes and thereupon closed the nozzle and simply watered down the smudged ends of bales (p. 1834). By that time he received word that the fourth floor was also under control so he stopped the water tower from even going into service (p. 1835): "The water tower never used a drop of water". And he immediately ordered all fire companies to return to their stations except one company for each floor to overhaul the burlap. They overhauled the fourth floor in fifteen minutes and he sent Chief Mahoney home. He estimated the length of the fire as follows (p. 1836):

> "Twenty minutes on the top floor for the last places of living fire, or visible fire, fifteen minutes on the third floor, less than ten minutes on the second floor, and possibly three-quarters of an hour on the mezzanine and first floor."

He testified (p. 1838) that the fire was a "flash fire", which meant that it flashed over lint and burned the lint to a black carbon. It did not burn the burlap.

Two bales of burlap on the second floor had caught fire and these were put out. He was asked (p. 1840):

"Were there any ashes there which indicated that any stock there had been obliterated?
A. No."

And again (p. 1841):

"I did not find any accumulation of ashes there indicating that the stock had been burned out of sight and obliterated. * * *"

On the first floor (p. 1841):

"As far as the stock being burned out of sight in there, it was not either. No, there was not any stock burned out of sight there."

On p. 1842 he states:

"On the second floor and on the third floor * * * there was a trail of kerosene and in picking the grease spot up it was still alive. You could see the kerosene on your hand and also smell it, and the smell of kerosene or the odor of kerosene was quite prevalent at that third floor."

On p. 1848 he states:

"Well I would say it took fifteen minutes to overhaul the third floor and ten minutes for the second floor. As to what would that indicate to me relative to whether or not that fire had gotten a deep-seated hold in the stock, for example, the Pacific Bag Factory, a building with almost like occupancy, and the Nottson Factory, on Clay Street, a fire which I handled on both occasions; in the Pacific Bag Factory it took over 18 hours

to overhaul and a watch line on it for over one week, and the Nottson took us eleven hours to overhaul and a watch line for some fourteen hours after that."

And, finally (p. 1849):

"*It was the fastest stopped fire that I have ever seen in my life in an occupancy of that sort.* Answering your question directly, *the damage was to the stairwell proper,* a part of the partition in the rear of the first floor, a hole in the first floor, several holes where we had to chop through to let water down to take the weight off of the floor. * * * No, *there was not enough ashes that it necessitated the removal of them.* 'If there had been any large quantity of stock burned up what would you (we) have done?' Remove it to the street. No, we did not have to remove any to the street."

Chief Mahoney testified that he felt of the glass of the second floor window as he went up the building and it was cold. It was not even warm (Tr. Vol. IV p. 1891). He estimated the length of the fire from twenty to thirty minutes (p. 1892). He testified that he particularly worked on the fourth floor. That there was none of the stock burned out of sight. (Tr. p. 1893):

"I couldn't say that I did find any of it that was obliterated and reduced to ashes. As to 'was there any of the stock there but what could be identified?' Well, *I would say that it all could be identified,* possibly there might be a sack or two on the top of the bales, there would not be very many loose bales, a few of them there, *but the bales themselves they stood there intact.*"

On p. 1895 he stated:

"Q. Was this a difficult fire to control and extinguish?

A. No, I would not say it was. It was extinguished rapidly, quickly I mean.

Q. Was it difficult to overhaul this stock?

A. No."

Assistant Fire Marshal Captain Sullivan who was also head of the Fire Patrol testified that the men of the Patrol covered the stock immediately to protect them from fire and water (Vol. IV p. 1909); that he smelled coal oil as soon as he came into the building. He took Hyland to the coal oil and (p. 1911):

"I said, 'Smell this then', so I took the rubbish * * * small pieces of sack and burlap and let him smell it with his nose, and he said, 'There is coal oil there', and I said, 'Of course there is.'"

On p. 1912 Sullivan states:

"I went over all the building looking out for the different fires, and machinery and everything to see that they were covered in case there was any water, the fire was all on the stairway."

Again, p. 1915:

"Q. Was there any stock that was burned into ashes in this fire?

A. There were no ashes there at all.

Q. Did you have any ashes to throw into the street?

A. Absolutely none, we didn't throw anything in the street the night of the fire because there

was none there. * * * If there were ashes we would have to pick them up and throw them in the street."

Sullivan stated that there was no water in the basement except at the low place in the rear end (Tr. p. 1915):

"There was about two inches of water back there that was in that southwest corner. They took it up in buckets, I ordered them to do so. No, we did not use the pumps on the building, we have got two great big pumps, one pump about 1600 gallons and one 200 and we did not bring them to the fire, we did not even use them, we had no use for them."

He discussed with Hyland who set the fire (p. 1916):

"I asked him who he thought done it and *he said he thought it was burglars.* * * * And I said, 'There was no burglars in the thing, no way of getting in that building, your windows and doors were locked and the firemen had to break them down to get in here.' "

Fire Marshal Kelly of San Francisco testified that he was not at the fire on Saturday but was there on the 21st of October—the Monday morning—following it. He had photographs taken, which are defendants' exhibits C to I. He described the condition of the damage to the stairwell and the fact that the fire was confined mainly to the stairwell and to a smudge fire on the mezzanine floor (Vol. IV pp. 1962 et seq.).

That there was no connection between the smudge in the mezzanine floor and the fire up the stairwell from the second to the fourth floor. The mezzanine door was closed (Tr. Vol. IV p. 1966). That the fire in the stairwell from the 2nd to the 4th floor scorched the inside of the stairwell equally both top and bottom due to the fact that it was not burning in the wood but was a gas burning from the kerosene. That there was a strong odor of kerosene which he could still detect two days after the fire (p. 1969).

He testified that it was almost impossible to burn a bale of burlap. That you would have to have an outside fire kept up to do it. That at the Pacific Bag fire the premises had burned out and there were hundreds of bales that fell through the floors to the basement and they were not burned beyond recognition. That you could cover a bale with kerosene and you could not burn it beyond recognition. That the stairwell burned in the instant case because it acted like a funnel while the oxygen lasted (pp. 1974-5). He then testified to the kerosene on the second and third floors and of some scorch damage to edges of burlap piled near the stairwell, as also on the fourth floor (pp. 1978-81).

He discussed the fire with the plaintiff Hyland and informed him it was an incendiary fire (p. 1983):

> "Mr. Hyland then told me that some two months previous to this fire the building had been burglarized. * * * Mr. Hyland told me at that particular time that he suspected three former

> employees of the plant. * * * I asked him why he would suspect these three people, owing to the fact that quite a length of time had elapsed between the time they were under his employ. * * * Mr. Hyland was emphatic in his accusation and we took the names of the suspects."

Inspector Kelleher was assigned to the case, so Kelly states (p. 1984):

> "Inspector Kelleher and myself then returned to Mr. Hyland's place of business, and Mr. Hyland * * * repeated the conversations which he had told me some few hours previous. * * *"

He then states how the three men whom Hyland accused of setting the fire showed that they had no connection with it in any manner (Tr. pp. 1984-5). After this

> "Mr. Hyland still felt that the three people were the ones that had started the fire." (Tr. p. 1985).

The various Patrol men who testified confirmed the testimony heretofore related, that the damage to the building and stock was very minor and no stock burned out of sight, no water pumped out of the basement, and no debris or ashes removed to the street on account of the fire. See: W. Lee, Vol. IV p. 2268; McCarthy, Vol. IV p. 2260; Lee, Vol. IV p. 2272; Payton, Vol. IV p. 2286.

The testimony of these witnesses who were disinterested shows that the testimony of Hyland that he

didn't know the fire was incendiary, that he smelled no kerosene, that there was $15,000.00 (later increased to $46,000.00) of stock burned out of sight was false, and that he knew it was false when he swore to his proof of loss and later to his pleadings, and later as testimony in the trial of this case.

IV.

PLAINTIFF KNEW THAT HE WAS SWEARING FALSELY AS TO THE VALUES OF HIS MERCHANDISE AND THE AMOUNT OF HIS LOSS IN HIS PROOFS OF LOSS, IN HIS PLEADINGS AND AT THE TRIAL, AND HE KNEW THAT HIS AGENTS AND EMPLOYEES PREPARED FALSE STATEMENTS OF VALUES WHICH HE SIGNED.

Appellant Hyland had a personal business which he had built up under his own name. He was fully cognizant of the details of this business. He had his office right in his factory and he personally did all of the buying of raw materials and personally sold all of his finished products. (Tr. Vol II p. 575). He prepared and was familiar with the various forms used (Tr. Vol. I pp. 266 et seq.).

After having thoroughly established this fact he has attempted, in order to escape the charge of fraud and false swearing, to claim that his books were not accurate, that they did not show the amount of stock he had, that he did not know how much stock he had on hand, and that he relied for these things entirely upon his employees, and that if there is anything wrong it was the fault of the employees.

We will later show that this is quite immaterial because the plaintiff was in daily contact with his employees and directed their work and under such circumstances he is bound by acts of his employees and agents.

But the claim of plaintiff cannot be believed. In Vol. I p. 441 he admitted that his statements concerning figures were based on his personal knowledge.

> "Yes, it is based on my personal knowledge. I have studied this case quite thoroughly recently. No, not exactly for the past two years; I have had other occupations. Yes, I have made notations from various reports of auditors, from which I have been testifying, and *which of course, I may add, I know to be correct from my own personal investigation.*"

Not the slightest excuse was given for the change of dates on the inventory stock cards which caused a duplication of merchandise of over $41,000.00 One stock card was changed from April 1929 to June 1929. The other was changed from May 20, 1929 to June 20, 1929 (Tr. Vol. III pp. 1463-4). The contents of both cards were contained in the inventory of Ernst & Ernst of May 29, 1929 (last one being the next in order stock card #2199 (Tr. Vol. III p. 1488)) and were then again counted by Hood & Strong as goods received after May 31, 1929. Not the slightest explanation is given why anyone in the employ of Hyland should have wilfully done such a thing except at the direction of Hyland.

The grading of the merchandise was done by two employees of Hyland's, and it was misgraded to a *higher* grade. Ledgett admitted that he graded the quality of the merchandise in the Green Street warehouse (Tr. Vol. II p. 684). Kraus graded it at the factory (Tr. Vol. II p. 795). Kraus admitted that an expert in burlap can tell exactly the difference in grade and the correct grade.

Taylor testified that he priced this misgraded inventory knowing that there were no such grades in the factory or at least no such quantity of such grades in the factory, and that he did it because he was told to price them thus (Tr. Vol. III pp. 1450, 1455, 1529).

Plaintiff swore that the prices in his proof were those of landed cost (Tr. Vol. I p. 527):

> "The prices set forth in that proof of loss represented our actual cost to the best of my recollection. That is the best of my belief."

On cross examination he admitted that he used the Bemis 5 bale retail price as supplied to their salesman and that he had even added overhead cost to that price (Tr. Vol. II pp. 576-9). (See also Tr. Vol. III pp. 1530-1.)

Plaintiff, however, testified that he was not familiar with the schedule attached to his proof of loss (Tr. Vol. I p. 442), that he did not know about the values that were placed on those goods (p. 446), that while he thought his accountant, Taylor, did keep a perpetual inventory he had never seen such an inven-

tory except that in the course of years he might have casually seen it, and that it was not produced or referred to when Adjuster Smith demanded it in his presence (p. 447). He denied that his accountant, Taylor, stated that his perpetual inventory showed approximately $90,000.00 in the presence of Adjuster Smith and himself (p. 509). He admitted that a perpetual inventory was kept and that actual physical inventory was taken twice a month but that he never personally had anything to do with it (p. 499). He swore that he wasn't familiar with the schedule of his proof of loss, stating (p. 446):

> "That schedule had been prepared as I advised you before by Mr. Ben Sugarman and by our accountant Mr. George P. Taylor. * * * I was not thoroughly familiar with the Radford inventory, I had looked it over just casually. * * * I don't know about the values that were placed on those goods we had been discussing."

He denied that Adjuster Smith asked to see his books (p. 500). He stated (p. 508):

> "Q. And you had never been informed of the fact that there was a perpetual inventory at Sacramento Street which at your own valuation showed but $88,000.00 on hand on October 19, 1929?
>
> A. That is correct."

Tr. page 510:

> "Q. Do you remember shortly before the 24th of December that you were in the office of R. V. Smith with Ben Sugarman, Warner Grove also

being present, and you stated that the total value at Sacramento Street was $102,000.00 and some odd; that Mr. Smith stated to you that your own books showed it was a little over $88,000.00 and that you turned to the telephone and called up Mr. Taylor and then stated to Mr. Smith that Mr. Taylor's figures were $88,252.50?

A. I don't remember any such conversation."

On page 499 he states as to the physical inventory taken twice a month (the fire occurred October 19th):

"I cannot say positively whether or not there was a physical inventory taken at Sacramento Street on the 15th day of October."

At page 513 he testified as follows:

"Mr. Taylor and Mr. Ledgett make physical inventories twice a month at both Sacramento Street and at Sansome Street. Reports of these inventories were presented to me in condensed form by Mr. Taylor. * * * *Such a condensed report was given to me showing the total merchandise on hand at Sacramento Street on October 15, 1929.* As to whether any of these reports were used in preparing our proof of loss I don't know, I had nothing whatever to do with it. Answering your question why, if we had such records, did we employ Hood & Strong, my reason for employing Hood & Strong was that I wanted to be absolutely certain beyond any possible doubt that the amount we had claimed was correct."

Not only are these statements contradictory in and of themselves and demonstrate by his own mouth the

falsity of his testimony, but other evidence also fully confirms its falseness.

Radford, who inventoried every piece of merchandise immediately following the fire, saw the perpetual inventory, checked his inventory with Taylor and ascertained that he had the complete amount supposed to be on hand per the perpetual inventory. He stated (Tr. Vol. V p. 2521):

> "I made this check at various times with Mr. Taylor and Mr. Ledgett to ascertain if I had removed the entire lots of any particular kind of merchandise. * * * I would ask him or he would tell me—he would refer to his stock sheets or perpetual inventory and tell me how many bales there were supposed to be in that particular lot and in that way I would know that I had removed that complete lot."

And (p. 2531) Taylor told him that his inventory was accurate with the exception of a few bags. And again (Tr. Vol. V p. 2605):

> "The only statement he made to me was after I had given him a copy of the inventory was that we were only a few bags off."

Adjuster R. V. Smith testified (Tr. Vol. V p. 2622) that Taylor told him the day after the fire that the merchandise was less than $100,000.00, between $90,000 and $100,000. That he had an inventory which he kept perpetually and that he kept it up to date at all times. On the Monday following (p. 2627) he asked Hyland for information so he could estimate the loss, and Hyland stated that Taylor

"keeps a very accurate and up-to-date record on that and he explained to me that Mr. Taylor was a very competent bookkeeper and had very accurate records, and he called Mr. Taylor then and asked Mr. Taylor what he thought the stock would run, and Mr. Taylor said, 'Well, approximately somewhere I would say between $90,000 and $95,000. * * * I can get that for you exactly in just a little while'."

Adjuster Smith further testified (p. 2751) that Hyland's adjuster, Sugarman, had submitted to him an inflated claim of loss giving the lot numbers, value and percentage of loss and damage:

"He * * * told me that *Mr. Hyland had made those figures, had made that claim. Yes, that Mr. Hyland made this claim.*"

And again (p. 2754) in his own office with Mr. Hyland, Warner Grove and Sugarman present, just before the filing of the proofs of loss on December 24th:

"I asked Mr. Hyland at that time how he fixed the prices on that schedule. He told me that those were from telegrams that he received quoting prices, and they were in code, and he deciphered them properly. I asked him if he did not think it the proper thing to let me have the key to the telegrams, and let me make comparisons so I would have something to check on; I explained to him at the time that I had been unable to get price verifications from other burlap brokers or from dealers. * * * He told me that those were his private affairs and that was all the information I could have on that subject. I also asked him at

that time if he was satisfied with the grades as well as the prices that he had given me, and he told me that he was and that I would find those were 100% right."

Smith then pleaded with him to present facts as to amounts, grades and prices so that he, Smith, could exercise leniency, give him the benefit of the break and adjust the loss, but he refused to do it. (Tr. p. 2755):

"But he did not do it. I said, 'If you file a proof of loss and you set up incorrect grades or incorrect quantities or incorrect prices and swear that those are the correct prices, you will vitiate your policy contract and by the terms of the contract you might lose all your insurance'. I said, 'I want to warn you of that'. I said, 'I have called Mr. Sugarman's attention to that and I want you to know that I told him about it'. I addressed that conversation to Mr. Hyland. *Mr. Hyland was a little bit peeved at that and said, 'We will take all the chances on that'.* Sugarman said, 'You don't need to worry about that, R. V., we will take all the chances on that, we will attend to that'."

Again (p. 2757) Adjuster Smith talked with Hyland about his physical inventory and his prices. *Smith made a memorandum of the amounts discussed:*

"In the office that day when I called Mr. Hyland's attention to the fact that his book inventory or perpetual inventory very nearly proved the correctness of the physical inventory when it was priced according to its costs—I have here a memorandum of that I would like to refer to;

on the inventory the prices were $86,816.21 and their book inventory or their perpetual inventory as the figures were finally given to me were $88,272.55. That figure had been given to me numerous times. This particular memorandum I made on a pad that day in the office while I was talking, during this conversation I have just related. Mr Hyland said, 'No, I think you are mistaken about that, the values are $102,000, the book values are $102,000.' I said, 'No, you never had any such value as that, that is built up by Hood and Strong method of applying the cost of sales. That has nothing to do with the actual merchandise, that is a fictitious value'. * * * He said, 'You are mistaken about that, Mr. Smith.' I said, 'You call Mr. Taylor and he will tell you that is correct'. So he called Mr. Taylor and Mr. Taylor gave him this figure and Mr. Hyland repeated it to me, $88,272.55. I just kept this memorandum as a reminder of that conversation."

As an illustration of the fact that plaintiff knowingly swore falsely in his proof of loss and testified falsely in the trial, we may take the item of grain bags that were stored at the rear of the third floor. Plaintiff testified at the trial that these bags were damaged by fire and water, having been thrown down and walked on and were one "soggy mess" (Tr. Vol. I p. 239; 479), and in his proof of loss he valued them at $1,078.36 (Tr. Vol. I p. 438, Item 402) and he rated the damage done these bags at 50% (Tr. Vol. I p. 424).

The actual facts were these: These bags were not damaged in any manner whatever. There was no

evidence of any fire in the rear of the third floor. Fire Marshal Kelly made a careful investigation and testified that thread and burlap in machines halfway back were not burned and that in the rear there was no evidence of fire (Tr. Vol. IV pp. 1979-80).

Patrolman George C. Lee testified (Tr. Vol. IV p. 2274) that he personally covered these sacks with tarpaulins while they were still piled up dry and undamaged. Lieut. McCarthy testified to the same effect (p. 2260). Adjuster Smith testified that they were piled up, dry and undamaged and that through mistake the tarpaulins were left on them a day or so after other tarpaulins had been removed, and it was necessary for him to send specially for the Patrol to return and get these tarpaulins (Tr. Vol. V p. 2684). Radford testified that he personally inventoried these sacks after the fire and that they were not damaged in any particular whatever (Tr. Vol. V pp. 2522, 2534). They were inventoried by him as undamaged goods, were not removed from the factory to the warehouse where damaged goods were taken, and in the proof of loss it is admitted that they remained on the third floor at the factory (Tr. Vol. I p. 438, Item 402).

We have not attempted to do other than just cite a few of the instances in which Hyland personally swore falsely. If we took all of the circumstances into account and attempted to cover them all in this brief it would extend it beyond any reasonable size. What we have quoted and cited is ample evidence to sustain the finding of the chancellor that plaintiff intentionally swore falsely to his proof of loss, to his pleadings, and in the trial.

Nor can plaintiff escape the effect of the false swearing of his employees nor of the fact that his employees under his direction supplied him with the figures and kept his books. The plaintiff was in close touch with his business and kept his office at the factory. He was in close touch with his employees and directed them in the compiling of the figures and schedules from which he computed his loss. He personally suppressed and directed them to suppress his cost figures, as shown in the testimony of Adjuster Smith above.

The statement of counsel in the brief that plaintiff knew nothing about his books, never made an entry therein, nor directed one to be made therein, is pure assertion. It was shown that he knew his business thoroughly. As an illustration of the fact that he knew what was going on in his books is shown by his personal approval in his own handwriting of the entries showing the secret commissions paid to Colbert. As we have shown, supra, he denied making such a secret payment to Colbert and it was finally dug out of his books and presented as Defendants' Exhibit JJ, and it reads as follows (Tr. Vol. IV p. 1729):

> " 'Journal Entry Hyland Bag Company No. 4897, San Francisco, Cal., July 25th, 1929. Miscellaneous Revenue, Debit $100.
>
> 'Commission account, Debit $337.50.
>
> 'Accounts Receivable, Geo. P. Colbert, Credit $437.50.
>
> 'Commission, allowed on purchase of 100,000 Calcuttas (H. M. N. Contract # 1194) @ .0075, $75.00.

'Commission allowed on purchase of 350,000 yds. 37/10 (H. M. Newhall contract #1147) @ .0075, $262.50.

'Allowed part of $300 c/M for Inferior 37/10 Burlap H. M. Newhall Contract see Voucher P. N. 1865, $110, Total $437.50

'Note of G. P. Colbert dated 11/19/28 for $300, surrendered to G. P. C. as part payment of above. Balance Paid by P. N. Vo. #1860, 127.17, which is the 137.50 difference between the above credit and note less interest of $10.33 from 11/19 to 7/25 @ 5%.

'Approved Richard C. Hyland.' "

Incidentally, the $250.00 "payroll" payment to Colbert was put in the payroll by Taylor at the suggestion of Hyland's confidential secretary-superintendent, and Taylor testified that it was done to conceal it as it was not contemplated that anyone would look in the payroll for it. He stated (Vol. VI p. 3183):

> "An entry in the payroll account would not be discovered by any other person in the office because that was under my personal control all the time, and nobody else had access to it. * * * Mr. Colbert was never an employee of Mr. Hyland."

An employer cannot escape the consequences of the acts of his employees under such circumstances, and false schedules prepared by them under his direction which he solemnly executes before a notary will constitute false swearing on his part. As said by the Fourth Circuit Court of Appeals in

American Eagle Fire Ins. Co. v. Vaughan, 35 Fed.(2d) 147:

"The ordinary rule is that false swearing by an agent authorized to make proofs of loss will defeat the rights of the insured under the policy, even though the insured be innocent. (26 C. J. 386)."

See also

27 *Corpus Juris,* p. 56;
Mick v. Royal Exch. etc., 91 Atl. 102;
Saidel v. Union Assur. Society, 149 Atl. 78.

And it should be remembered also that the plaintiff in presenting his proof of loss was swearing to facts concerning his merchandise, the amount of it and the value of it, as to which he had intimate information and expert knowledge. In this instance he not only had expert knowledge of his actual cost which he himself could use, but he suppressed and refused to allow the adjuster of the insurance companies to even see his costs.

The Fourth Circuit Court of Appeals in

Orenstein v. Star Ins. Co., 10 Fed.(2d) 754,

puts the proposition plainly as follows:

"The oath as to values in the proofs of loss was not a mere matter of opinion. It was a sworn estimate of value by one having special knowledge of the property made with the intent that the other party, ignorant on the subject, and with unequal means of information should rely upon it to his injury. It appeared that this estimate of value was grossly excessive and the circumstances surrounding the fire were such as to warrant the conclusion that it was wilfully false and fraudulent."

There can be no reasonable doubt in this case that plaintiff intentionally and deliberately swore falsely to his proofs of loss, his pleadings and in his testimony at the trial, and under the policy provision this voided his policy (Tr. Vol. 1 p. 305):

> "This entire policy shall be void * * * (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject matter thereof, whether before or after a loss."

V.

PLAINTIFF COULD NOT INSTITUTE OR MAINTAIN THIS ACTION BECAUSE HE FAILED TO APPOINT A COMPETENT, DISINTERESTED APPRAISER AFTER DEMAND SO TO DO, AND HE AND HIS APPRAISER PREVENTED AN APPRAISAL.

When plaintiff presented his proof of loss the companies were confronted with an exaggerated claim of loss, totaling $73,601.96, which included $15,645.25 for merchandise "burned out of sight."

As the chancellor has found, the defendants were at a peculiar disadvantage. The plaintiff refused to let them see his books and determine his costs, he suppressed the physical inventory taken four days before the fire, and he also suppressed any quotations of burlap prices from other dealers (Tr. Vol. V p. 2812). Adjuster Smith states that Hyland personally refused to give him his cost prices (Tr. Vol. V pp. 2754-5) and that even six months after the fire in April of 1930, Smith did not know what the true values of the stock were; he was simply unable to get

correct prices (Tr. Vol. V p. 2765). He first got a hint of the misgrading still later at the auction sale when so advised by the buyers (Tr. Vol. V p. 2836).

However, defendants were sure that the loss did not exceed approximately 25%; they were sure the total stock was about $88,000.00. The chancellor has found that 75% of the stock was not damaged at all, and that on the remaining 25% (or $22,000.00) substantial salvage would have been realized so that the actual loss was much under $22,000.00

The companies, however, had to act quickly on the proof of loss and therefore they admitted a loss not exceeding $22,733.18 (Tr. Vol. I p. 397).

It is to be noted that this admitted loss is more than the amount of the loss as fixed by the trial court, viz.: $22,000 less salvage on damaged goods. (Adjuster Smith has shown that this net loss was really only $10,171.92 (Tr. Vol. V p. 2723.))

Plaintiff did not accede to this amount, and thereupon these insurance companies demanded an appraisal and appointed William Maris as their appraiser (Vol. I p. 398).

Where this action is taken by the insurer, it is mandatory that an appraisement be had (Tr. Vol. I p. 311) and the California standard form policy allows the assured the right to bring an action thereafter *only* where (Tr. Vol. I p. 312):

> "if for any reason *not attributable to the insured or to the appraiser appointed by him* an appraisement is not had."

He must appoint a "competent and disinterested appraiser" (Tr. Vol. I p. 311) and the two appraisers must select a "competent and disinterested umpire" (Tr. Vol. I p. 312).

The policy further provides (Tr. Vol. I p. 314):

> "TIME FOR COMMENCEMENT OF ACTION. No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured of all the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire."

Plaintiff immediately appointed as his appraiser one George P. Colbert, who was head of the importing department of H. M. Newhall Company, a firm of high standing in this community. Colbert was, as the chancellor finds "ostensibly" a man of high standing in the community. Actually Colbert was a weak, contemptible crook who had allowed himself to get within the grasp of Hyland and was entirely subservient to him. He was in the secret pay of Hyland, receiving secret commissions from Hyland on sales of Newhall Company's goods to Hyland, and after the fire he aided Hyland in perpetrating frauds for the collection of his insurance as we will show. He would not agree to anyone acting as an umpire excepting certain men whom he named who were having business relations with Hyland. Among these was the name of Alexander Logie, who sold a great deal of merchandise to Hyland. Maris objected to these men because of their extensive dealings with Hyland. Colbert categorically refused to consider any of the disinterested men submitted by Maris (Tr. Vol. III p.

1270). However, investigation disclosed that Mr. Logie was a man of peculiarly high character, an expert in burlap and one who could be relied upon to act as umpire without fear or favor, no matter how his decision might affect his personal fortunes. Mr. Maris, the appraiser for the insurance companies, on ascertaining this, then agreed to Logie as umpire.

On learning that Logie was convinced that burlap could not have been burned out of sight in this short flash fire, that was extinguished in a few minutes, Colbert asked Logie to hold up his acceptance until he (Colbert) could "consult" further, and thereafter called Logie up and asked him not to serve.

These insurance companies pleaded the defense that the plaintiff had not appointed in Colbert a competent and disinterested appraiser and had prevented an appraisement and arbitration in accordance with the policy conditions (Tr. Vol. I p. 48).

When the correspondence between the two appraisers was being put in evidence, the chancellor was impatient at first and stated that he would assume that the appraisers simply couldn't agree upon an umpire; that that would not get us anywhere; and that he would assume them "equally to blame" (Tr. Vol. III pp. 1288-89-90).

However, when the evidence was all in, it was so conclusive, that the chancellor found Hyland had failed to select a competent and disinterested appraiser and that by his own actions and those of his appraiser he had prevented an appraisement. The evidence amply supports this finding.

Plaintiff called Colbert as his witness to answer the pleaded defense that a competent and disinterested appraiser had not been appointed. In his direct testimony Colbert maintained that the entire fault lay with Maris in refusing to agree to an appraiser, notwithstanding the admitted fact that his nominee, Logie, had been agreed upon by Maris. Asked on cross-examination if he had not submitted only names of those beholden to Mr. Hyland or himself as umpire, he denied it in toto. On being pressed, he admitted that 50% of them were: "Yes, at least 50%". (Tr. Vol. III pp. 1292-3).

On being pressed further, he denied that he was in the pay of Mr. Hyland. He denied that he received $250.00 from Hyland just prior to the fire (Tr. Vol. III p. 1291).

He was recalled for further cross-examination (Tr. Vol. III p. 1747) and at that time on cross-examination Mr. Colbert broke down and, under oath in open court, confessed his whole nefarious and fraudulent connection with Hyland. He admitted that after the fire he had taken the Newhall Company forms to Hyland at the latter's request and that they had "faked" more than $185,000.00 worth of contracts, supposedly being purchases by Hyland from the Newhall Company, dated some months prior and for delivery immediately following the fire. Colbert signed these for Newhall Company, although he did not have the authority to do so (p. 1753). The contracts were then cancelled. These contracts were used by Hyland to show an exaggerated loss in his arbitration under his use and

occupancy policies of insurance, he claiming that it was necessary for him to cancel $185,000.00 worth of business on account of the fire.

During the course of this trial defendants had demanded these contracts, and plaintiff had given as his excuse that he "could not find them."

Colbert confessed that Hyland had told him that he had these contracts during the course of the present trial but that they did not show high enough price, and he wanted them rewritten. Showing the control Hyland had over Colbert, after the beginning of the trial in this case, two years after the fire, he forced Colbert to bring over to him some more of the Newhall Company contract blanks and new contracts were entered into, being identical with the former fictitious contracts but with a difference in the price. (Tr. Vol. IV pp. 1765-6; 1800 to 1804). Hyland denied this, but the trial judge has stated specifically, "I believe Colbert's testimony as to this transaction". (Tr. Vol. I p. 200).

Mr. Logie testified that after he had been accepted as an umpire and he had told Colbert he did not think there was any out of sight loss,

> "Mr. Colbert replied that he was required to consult in regard to that, and that later on in the day he phoned and told me that I had not been served." (Tr. Vol. IV p. 2162).

And again, on the same page:

> "I had a conversation with Mr. Colbert on a Monday morning (following the fire) and nat-

urally the question of the Hyland Bag Company fire was adverted to, and I was requested not to give out any prices if I was called upon by anyone to give prices on burlap bags."

It was shown from the books of the plaintiff that Colbert was on the payroll of plaintiff for $250.00 for the month preceding the fire (Tr. Vol. VI p. 3181) and that he had received other emoluments from plaintiff in the way of secret commissions amounting to as much as three-fourths of a cent on hundreds of thousands of yards of burlap sold to plaintiff by H. M. Newhall Company and *that that particular transaction was oked in the book by plaintiff personally* (Tr. Vol. IV p. 1729).

It is no wonder that in the face of this accumulation of testimony, the truth of which could not be doubted, the chancellor changed his attitude from one of indifference towards this issue and made a flat finding of fact that the plaintiff had wilfully and deliberately prevented by his own actions, and by those of his appraiser, the appraisement of this loss and therefore could not maintain this action on the policy, it being a condition precedent to the bringing of the action that he appoint a competent and disinterested appraiser to effect an appraisement, and further that the failure to have an appraisement be not due to the actions of the insured or his appraiser.

Old Sausalito Land Co. v. Union Ins. Co., 66 Cal. 253;

Carroll v. Girard Fire Ins. Co., 72 Cal. 297.

In the *Sausalito etc. case,* supra, it is said:

> "It is the clear meaning of the contract that if the amount of loss cannot otherwise be adjusted to the satisfaction of the parties, it shall be adjusted by the mode of arbitration therein prescribed, and that until such adjustment, *or a fair effort on the part of the assured* to obtain it, no cause of action arose." (Italics ours.)

Appellant claims that the Logie incident occurred after the ninety day period for an appraisement and that therefore, technically, there was no violation of this portion of the policy.

But this is overlooking the fact that Colbert refused to agree to any umpires prior to the expiration of the ninety day period. He refused to agree to men who were entirely disinterested in his letter of February 19, 1930 (Tr. Vol. III p. 1268) or to the many other men of undoubted high standing and disinterest in the case submitted prior to March 25th (Tr. Vol. III p 1273). Colbert would never agree to any of these. In his letter of March 28th Maris stated to Colbert, first as to Colbert's nominees then as to his own as follows (Tr. Vol. III p. 1273):

> "Each of these gentlemen is in some way naturally looking for favors from Hyland or else is beholden to Hyland or your firm of H. M. Newhall Company for favors done them in the past. It would naturally be embarrassing for any of these gentlemen under these circumstances to be compelled to give an opinion that would be unsatisfactory to their friends so deeply interested. I presented to you for consideration the follow-

> ing names as prospective umpires. * * * *When you took a memorandum of these names you told me you would look them up and advise me as to your decision within a few days, but I have not heard from you since."*

Colbert didn't even reply to this letter until April 5th (Tr. Vol. III p. 1274) and then he did not reply to the query as to whether he would or would not accept any of these names, but he suggested some further names. Again, on April 9th (Tr. Vol. III p. 1276) Colbert wrote that he was unable to agree to one particular man, but makes no comment as to the others.

Finally, on April 12th, *Maris accepted Alexander Logie as a "competent and disinterested appraiser."*

Then it was that Colbert suggested to Mr. Logie that he had better not serve.

The evidence is clear that Colbert absolutely would not nominate or consider any disinterested man as an umpire. He would not even allow his own nominee to have an honest opinion but insisted on his withdrawing after he had been accepted. The utter insincerity of Colbert in the light of this record is shown by three more excerpts, the first from his letter to Maris of April 21st (Vol. III p. 1280). He there said:

> "It gives me great pleasure to have you find out after interviewing Mr. Alexander Logie, one of the gentlemen suggested by me, that he was in no way beholden to Mr. Hyland and *would give a fair and unbiased decision in the case. It is indeed regrettable that Mr. Logie found it neces-*

sary to decline to act as he would have been a very capable and just umpire.''

Colbert thus admits that Logie was fully qualified, honest and unbiased and yet, when Logie was accepted Colbert procured his declination to serve and then "regrets" that Logie was unable to serve. Next, when pressed on cross-examination as to his nominating only those beholden to Hyland, he first denied this and then admitted it, stating (Vol. III p. 1292):

> "No, it is not a fact that relative to the names of the gentlemen whom I submitted to Mr. Maris for consideration that nearly every one of those gentlemen was in some way carrying on business with Mr. Hyland, some of them were and some were not. *No, I would not say most of them were, I would say about fifty-fifty.* * * * (page 1293) "Yes, *at least* 50% did have".

And again, on page 1292:

> "Mr. Maris finally agreed to Mr. Logie after turning him down first, and *I am of the opinion that he agreed to him because he knew that Mr. Logie would not act;* he was merely making a gesture that he was agreeing to one of my appointees. *Yes, that was my opinion. I am of the opinion* that he had a discussion with Mr. Logie and found out that Mr. Logie was not interested in acting in that capacity or he probably in some way found out from some other source that Mr. Logie would not act."

This testimony from Colbert ! the very man who had prevented Logie from acting because Logie in-

sisted on following his own honest and unbiased opinion as an umpire. He was of the "opinion" that Maris knew Logie wouldn't act! Could Maris possibly have known that Colbert would suggest to his own nominee that he not act?

The finding of the trial court is that Colbert would never at any time agree to a disinterested and competent umpire exactly as Maris stated the fact to be in his letters; it is amply sustained. The further fact that Colbert was only interested in getting an umpire appointed who was in some way beholden to the appellant is confirmed by his own statement that "at least" 50% of his nominees were of that caliber. Even Mr. Logie sold a great deal of goods to the plaintiff, and he was only accepted by Mr. Maris because of his peculiar traits of character and his high qualification as a burlap expert, which Colbert admitted was "second to none on the Pacific Coast" (p. 1272).

Appellant finally contends that the appointment of a competent and disinterested appraiser was not an issue in the case. This is directly contrary to the pleading where it is set up as an issue that the plaintiff personally and in conjunction with his appraiser prevented an appraisement (Tr. Vol. I pp. 48-9; 63-4).

It was further accepted as an issue by plaintiff at the time of the trial (Tr. Vol. III p. 1287). Plaintiff's counsel admitted that there was such an issue, and on page 1288 states that he was meeting the issue by presenting the testimony of Colbert, and counsel for the primary companies there stated as the ground of his cross-examination of such testimony (p. 1289):

> "In the event of failure due to the plaintiff, after it has been demanded, to select a competent and disinterested appraiser, he has failed to comply with the policy and he may not bring suit until that is done."

The opinion of the chancellor was (Tr. Vol. I p. 197):

> "The vice in appointing Colbert lay in the fact that his connection with plaintiff was secret and tainted with fraud."

He was (p. 198):

> "a bribed employee of a firm with which he had extensive dealings. * * * plaintiff used Colbert as a took in his attempt to get an excessive award for his losses at the U. & O. hearing."

And, again (p. 202):

> "The whole course of Colbert's dealings with the appraiser appointed by the insurance companies was designed to defeat an appraisement of the loss according to the terms of the policy."

The finding of the trial court is not based upon one incident. It is based upon the whole course of the conduct of Colbert prior to the fire and after the fire and while acting as an appraiser appointed by the plaintiff. This course of conduct by Colbert was insincere, untruthful, fraudulent and designed to prevent an honest appraisement, although in his letters he was careful to state that he was anxious for an early appraisal.

The contention that the appraisement was not necessary because an auction sale was later held to determine the value of the merchandise is puerile; and it is reprehensible in that it is an attempt to deceive this court as to the facts of the case. This auction was held more than six months after the fire, and approximately six months after the crash of the stock market in the depression, with the result that the prices of burlap were greatly reduced at the time the auction was held. Burlap was then a drug on the market.

An appraisement would have fixed the price as of the time of the fire. This amount of the loss figured at correct grades and prices as of the time of the fire is shown by Exhibit TTT (the percentage of damaged stock) (Tr. Vol. V p. 2710) and Exhibit UUU (the amount of the loss) to be $10,171.92 (Tr. Vol. V p. 2723).

The plaintiff, having failed to comply with condition precedent of his policies, cannot maintain this action against these defendants.

VI.

FALSE SWEARING WAS NOT WAIVED.

Appellant climaxes his grievances against the findings by the chancellor that he was guilty of fraud and false swearing in his proofs of loss by the technical contention that such false swearing was waived and that the trial court should have so found.

This argument is one of "confession and avoidance". In other words, he admits that he was guilty

of false swearing and that the court should have so found but that the court should have found that it was waived by the defendants! What a plea to address to the conscience of a court of equity.

But, actually, even as a technical argument it has no merit. In the first place, in order for an insurance company to waive any provision in its policy, it is fundamental that the insurance company must first have knowledge of the facts and then, with knowledge of the facts, waive the penalty (14 *R. C. L.* 1142).

Plaintiff at no time communicated to the defendants that he was swearing falsely. The defendants knew that the amount claimed was not correct but they did not at that time know just what the correct values were, and did not know the exact amount of the loss. The chancellor has found that the plaintiff suppressed his cost prices, suppressed the physical inventory taken four days before the fire, and suppressed quotations from other dealers. Adjuster Smith states that Hyland refused to give him his cost prices (Tr. Vol. V pp. 2754-5), and that he had not been able to ascertain the correct prices up to April of 1930, six months after the fire.

> "I had some prices that were less than the prices Mr. Hyland had quoted but they still were not the true prices". (Tr. Vol. V p. 2765).

It is certainly a strange argument for a plaintiff to contend that, because he had concealed prices and kept the true prices from the defendants, that the defendants have waived the fact of his false swearing. Merely to state the proposition is to answer it.

Secondly, the claim that by demanding an appraisement the insurance companies waived false swearing is negatived by the provisions of the policy itself. The California standard form policy provides (Tr. Vol. I p. 313):

> "NON-WAIVER BY APPRAISAL OR EXAMINATION. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage, or by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for."

Singleton v. Hartford Fire Ins. Co., 105 Cal. App. 320.

Thirdly, the claim that plaintiff's false swearing in the proofs was waived because formal objection was not made to it when objection was made to the proof of loss, is likewise without merit. Not only is it specifically provided in the policy, as quoted in the preceding paragraph, that assent to the amount of loss or damage as stated in the proof of loss shall not waive the other provisions of the policy, but the policy further provides that the assent or objection to the proofs shall be as to the amount contained in the proof of loss and not as to the other provisions of the policy (Tr. Vol. I p. 311).

Fourthly, the present suit is not on the proof of loss that was objected to by the insurance companies. Plaintiff abandoned his proof of loss, which was for $73,000.00, and filed suit for $76,000.00 which he then amended to claim a loss of $106,000.00. At the

beginning of the trial he again stated that he would raise the claim, this time to $107,000.00.

The chancellor has found, and the evidence amply sustains his findings, that not only was plaintiff guilty of false swearing in the original proof of loss, but he also was guilty of false swearing in these several pleadings. There could have been no waiver by the insurance company of this false swearing in the pleadings under any theory. It was immediately set up as a special defense in the answers (Tr. Vol. I p. 45). There was in fact no such waiver, nor was there any evidence of such a waiver. Plaintiff never even put any such theory of waiver in issue.

And, finally, the chancellor has found that plaintiff was guilty of false swearing at the trial. Here again we see that it is obvious that there could have been no waiver of his false swearing at the trial; no claim was made that it was waived and plaintiff did not make any issue of such a claim.

This specious technical argument of appellant illustrates very well the utter lack of any merit to this appeal.

VII.

POLICY COVERAGE.

There were certain policy coverage questions which the chancellor outlined but did not pass on due to the fact that he found plaintiff was not entitled to make a recovery (Tr. Vol. I p. 175). As this case is one in equity and the appellate court may consider it *de novo,* we will briefly present the status of the policies.

A. The Western Insurance Company of America policy attached when the values of the stock were in excess of $50,000.00 and having attached, it contributed on any loss resulting.

The policy of the Western Insurance Company of America is set out in the transcript (Vol. I p. 341) and is for $50,000.00. It is a California standard form fire insurance policy.

In this respect it is the same as the so-called primary policies on which the companies represented in this brief had insured appellant in the amount of $32,500.00, there being one other company with primary insurance of $17,500.00, a total of $50,000.00 primary insurance in effect when the Western policy was written.

The Western Insurance Company policy had the provision (Tr. Vol. I p. 343):

> "The amount of insurance under this policy is provisional and attached at all times in excess of $50,000.00. It is understood and agreed that this insurance shall attach only to the extent of the difference between the amount of all other specific insurance upon the property described herein and 90% of the actual cash value thereof; and the amount so arrived at *shall be the basis of contribution* with all other insurance in the event of loss, but in no event shall the liability of this company exceed the amount for which this policy is written. If, in the event of loss, claim does not exceed $50,000.00, it is understood and agreed that there shall be no insurance *effective* hereunder."

And again (p. 346):

"It is expressly stipulated and made a condition of the contract that, in the event of loss, this company shall be liable for no greater proportion thereof than 90% of the amount hereby insured bears to 90% of the actual value of the property described herein at the time when such loss shall happen, for nor more than the proportion which this policy bears to the total insurance thereon. In the event that the aggregate claim for any loss is both *less than $5,000.00* and less than 2% of the total amount of insurance upon the property described herein at the time such loss occurs, no special inventory or appraisement of the undamaged property shall be required.

It is agreed that 10% of the insurance under this policy constitutes excess insurance only and such excess insurance shall not be called upon to pay any loss until such loss exceeds 90% of the value of the property covered at the time of the fire, and then for such excess over 90% of the value of the property in the locations herein described. No claim shall be made under excess ininsurance until all other insurance has first been exhausted."

And again (p. 349):

"In this endorsement 'other insurance' shall mean 'insurance contributing herewith other than that provided by this policy, whether valid or not and whether the same be provided by solvent or insolvent insurers.' "

It is obvious at once from the above that these provisions of this particular policy are not only ambiguous but are in conflict with each other. It is quite clear that the policy did not attach until the values of the stock were more than $50,000.00. But it is also, we submit, clear that there was no failure of the policy to attach merely because the claim did not exceed $50,000.00. The policy was in effect, irrespective of whether a claim is made or not, and thus being "effective" it must be held to be a policy of insurance on which the insured could collect in event of loss.

The third paragraph quoted above indicates quite clearly that the company intended to be bound as a *contributing company,* even on the smallest loss, providing the policy had attached on values of more than $50,000.00, otherwise there would have been no need for the provision respecting claims of under $5,000.00.

In the last paragraph the only portion of the policy which constitutes excess insurance is the 10% clause.

That this must be so is shown when we analyze what would be the situation if a loss occurred. At the time that the Western policy was issued there was $50,000.00 of primary insurance in effect. The $50,000.00 of insurance under the Western attaching when the values exceed $50,000.00 made the total insurance in effect $100,000.00. Suppose there was a $10,000.00 loss under these policies (at that time there were no policies issued by the National Liberty). Now on a loss of $10,000.00, under the primary policies there would be the elimination of the 10% co-insurance. The same applies to the Western. In other

words, there would be effective $90,000.00 of insurance. The primary companies would aggregate, therefore a net of $45,000.00 of insurance and they would pay on the loss only the proportion that their insurance bore to the total amount of insurance in effect, that is, 45/90ths, or one-half. One-half of the loss of $10,000.00 would therefore be $5,000.00. The only way for the insured to be paid the remaining amount of his loss would be to construe the Western Insurance Company policy as liable to pay the remaining portion of it. Otherwise, the insured would have paid for $90,000.00 of net insurance, have a loss of $10,000.00 and receive only $5,000.00 on account thereof. It cannot be assumed that any such bizarre result was intended.

The ambiguity in the Western Insurance Company policy must be construed against it and it be held that the Western policy attached when the values exceeded $50,000.00 and that it thereafter became a contributing company the same as the primary companies. This was the understanding of Mr. McLaren of the Western Insurance Company, who executed this policy. Mr. McLaren said that when an excess policy attaches, it becomes then a contributing policy the same as the primary companies (Tr. Vol. III pp. 1149-50); that while they might "try to get away with it" there are "two sides" to it. (p 1145).

In view of the ambiguity in the endorsement, it certainly should be construed as a contributing policy, the values being in excess of $50,000.00 and the West-

ern Insurance Company policy having therefore attached. The rule is fundamental that where the policy is ambiguous it will be construed against the insurer.

B. The National Liberty Insurance Company policy was primary insurance and not excess.

The National Liberty Insurance Company policy was taken out shortly before the fire and was in the form of written cover notes for $15,000.00 and $70,000.00, but the policies had not yet been issued (Tr. Vol. I pp. 350-3; Exhibits Nos. 37, 38 and 39).

Where a cover note is issued, it is presumed to be the California standard form policy (Tr. Vol. I p. 350) which would constitute a primary and not an excess coverage. The cover note specifically states that it will be

> "subject to the printed conditions of the standard fire insurance policy of the state."

In addition to that, the California Political Code provides (Section 633 (b)):

> "This section shall not be construed to prohibit the use of cover notes to temporarily bind insurance or surety bonds pending the issuance of the policy or contract; provided, that for every such covering note so used, within ninety days thereafter a policy or contract shall be issued in lieu thereof, including within its terms the *identical insurance protected under said covering note* and premium consideration paid or to be paid therefor."

Fire coverage in California is presumed to be in accordance with the statutory form of policy coverage.

Northern Ins. Co. v. National Union Fire Ins. Co., 35 Cal. App. 481;

Law v. Northern Assur. Co., 165 Cal. 395 at p. 401;

Jones v. International Ind. Co., 39 Cal. App. 706 at p. 709.

As stated in

1 *Couch on Insurance,* p. 163:

"A binding receipt or slip in such case ordinarily being a document given to the insured, which binds the insurance company to pay insurance should a loss occur pending action upon the application and actual issuance of a policy, and containing the terms and conditions expressly agreed on, or, in the absence of express agreement, the terms and conditions of the policy ordinarily used by the company to insure like risks."

The National Liberty claimed that they did not intend to write a primary policy but only an excess policy attaching to values over $100,000.00, and have sought to reform their policy.

There are three objections to reformation. First, the proof adduced does not show that there was any "mutual mistake"; *second,* in the policy issued after the fire, (which was not accepted) coverage was purported by its terms to attach when values exceeded $100,000.00 and *then it became a contributing policy for any claim* (Tr. Vol. VI pp. 2988; 2993); *third,* in

its pleadings (Tr. Vol. I p. 70) the claim is made that the understanding was that the covering note would attach only where the value exceeded $100,000.00, and then only for the amount of the excess of such value over and above such sum of $100,000.00. In other words, that the loss would have to exceed $100,000.00 before there would be any contribution to the loss.

It is apparent at once that not only is this showing far from showing a mutual mistake between the parties, but it shows that the National Liberty Insurance Company didn't have a definite idea itself what the coverage was. The policy issued *after the fire* didn't even contain the limitation now sought by reformation.

There must be a clear, unequivocal showing of facts of a mutual mistake before a reformation of a policy will be decreed; it must not be a mere preponderance; it must be clear and unmistakable in character so as to produce complete satisfaction in the mind of the court.

Philippine Sugar Co. v. Government of Philippines, 247 U. S. 385; 38 S. Ct. 513; 62 Law Ed. 1170;

Rogers v. Jones, 40 Fed. (2d) 333 (10 C. C. A.);

Clarksburg Trust Co. v. Commercial Cas. Ins. Co., 40 Fed. (2d) 626 at 634;

Skelton v. Federal Surety, 15 Fed. (2d) 756 (8 C. C. A.).

The coverage of the policies therefore should be as follows: First, $50,000.00 of primary insurance in which the policies had been issued by six companies.

Second, $85,000.00 of primary insurance in covering notes by National Liberty Insurance Company; third, $50,000.00 of excess insurance of the Western Insurance Company of America which did attach as the values were more than $50,000.00, and it then became a contributing policy the same as the primary policies.

We have submitted the above only because it is an issue in the case. We believe the case will be properly and correctly determined by an affirmance of the decree of the chancellor, and that it will not be necessary for the court to further analyze the question of policy coverage. We therefore respectfully submit that the decree of the lower court should be affirmed.

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No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company, *Appellant,*

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation), *Appellees.*

APPELLANT'S REPLY BRIEF.

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Subject Index

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No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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APPELLANT'S REPLY BRIEF.

INTRODUCTION.

Appellant appreciates the deep interest manifested by the court upon the oral argument of this case, and avails himself of the privilege allowed of filing this reply brief.

The appellees upon the oral argument have cloaked their failure and refusal to pay appellant the loss which he sustained by insinuations of incendiarism directed against the appellant, and by unfair statements concerning appellant's testimony and the basis of his claim.

It is inconceivable that appellees could believe that the insinuations made in the oral argument are sufficient to convict the appellant of incendiarism. It will immediately be apparent to this court that the only result hoped for by them is that the minds of this court will be prejudiced against the appellant. We are confident that this court cannot be misled by this obvious attempt to prejudice it, and will consider this matter upon the record.

In this reply brief we will consider the following matters:

1. *Reply to appellees' statements upon oral argument.*

2. *Reply to statements made in each of appellees' briefs.*

3. *Further consideration of the law and question of false swearing.*

CONSIDERING THE MATTERS RELIED UPON BY APPELLEES UPON ORAL ARGUMENT.

The appellees upon the oral argument dwelt upon the following:

(a) They insinuated incendiarism by plaintiff.

(b) They dwelt on exhibit of the second floor.

(c) Charged fraudulent manipulation of accounts.

(d) Claimed Colbert transaction showed appraisal failure fault of plaintiff.

We consider each of the said matters referred to in the oral argument briefly in the order stated.

REPLYING TO INSINUATIONS OF INCENDIARISM AGAINST APPELLANT.

The Supreme Court of California has held that in the absence of a direct issue, it is improper for a jury to consider the incendiarism by the insured, even though the evidence has been admitted without objection.

Capuro v. The Builders Ins. Co., 39 Cal. 123.

See also:

Morley v. Liverpool, 52 N. W. 939 (Mich.).

We believe that it is just as improper for this court or the lower court to consider the question of incendiarism where there is no issue made, as it would be for a jury to consider it.

As previously stated, the insinuations of incendiarism against appellant are definitely and obviously an attempt to prejudice this court *in limine,* and should be so regarded. Although the trial court states that it was not claimed, and was not an issue in the case, that plaintiff set the fire or had guilty knowledge of the incendiarism (V. I, p. 179), the appellees have come into this court and tried to fix in its mind that the appellant may have set this fire. Such insinua-

tions are easy to make, are extremely prejudicial, and the individual attacked is helpless in his own defense. We state in reply thereto that to one who is personally acquainted with appellant, they are utterly ridiculous and inconsistent with his character. Second, they are entirely inconsistent with his position and financial situation and the condition of his business at the time of the fire. We refer to the following facts in the record.

First. While appellant was in the factory on the afternoon preceding the fire, he was not the last known person there. Miss Georgia Mitchell, the superintendent of the factory, was in fact the last person known to be in the building prior to the fire. Just before leaving the building she carried out her regular duty of going through the whole building, seeing that the windows were closed and locked, and the doors were closed. (V. II, p. 586; V. VI, p. 3106.)

At the time of the fire appellant's business was thriving; he was employing approximately 100 people. (V. VI, pp. 3109 to 3111.) In the nineteen days preceding the fire he shipped on the average of over 80,000 bags per day, of a value of almost $8000.00 per day. (V. III, p. 1666.) They were working to capacity. (V. II, p. 611.) Some of the employees were working nights during the week of the fire. (V. II, pp. 776; 810-11.)

In the year 1928 appellant's sales amounted to $2,129,368.75. (V. I, p. 247.) His sales for the year 1929 up to the day of the fire amounted to $1,349,-195.60. (V. I, p. 248.) He had on hand a large number of orders for delivery in October following the

fire. (V. III, pp. 1453 to 1455.) His inventory was reduced from $533,631.50 on May 31, 1929 (V. I, pp. 260, 261) to $287,418.75 on September 30, 1929 (V. III, p. 1400), or to $196,621.21 if we adopt the figures calculated by Hood & Strong on October 19, 1929 (V. I, p. 251), or to $153,056.26 (V. III, p. 1667) as shown by the general ledger on October 19, 1929.

On June 1, 1929, the total insurance carried by appellant on inventory was $541,637.50. (V. III, pp. 1609-10.) This did not include use and occupancy insurance or insurance on machinery, which the judge states in his opinion he was unable to say was excessive. (V. I, p. 179.) It is apparent from the record that appellant's business had continued for a number of years. Mr. Taylor states that he had been employed for about 13 years (V. III, p. 1297), and in charge of the insurance since 1919. (V. III, p. 1413.)

We have elsewhere shown that appellant did not know the amount of insurance carried by him on the day of the fire (V. I, p. 533), and that according to the testimony of an insurance expert, the fact that his stock was fluctuating and was over insured was of no significance. (V. III, pp. 1152 and 1154.)

The fact that coal oil was found in the factory and may have been used in connection with incendiarism is absolutely of no significance against appellant. A large quantity of coal oil was always kept in the factory for use in cleaning the printing rolls, and there were other drums of various qualities of oil kept on the third floor for the printing department. (V. II, p. 566; V. IV, p. 1943.) The presses and mixing table were washed off every night with rags dipped in kero-

scene. (V. II, pp. 641-2; 816-17.) An odor of coal oil was always present.

Considering the whole matter of insurance and the inventory as it existed at the time of and prior to the fire; and considering the thriving business of appellant, absolutely no reason has been shown why appellant should desire a fire. If appellant had desired a fire, his stock was $533,000.00 and his insurance on stock was $541,000.00 on May 31st, then a fire might have been advantageous. It is obvious that appellant could only lose by a fire on October 19, 1929, a business which he had taken years to develop, and any insurance he had would be insufficient to compensate him therefor. To even insinuate that appellant was guilty of this incendiarism is merely an attempt to prejudice this court and assassinate the character of a defenseless litigant. The conduct of the appellees in this regard deserves the censure of this court.

The decision of the trial court, which it makes its absolute findings, amounts, so far as the business and personal reputation of appellant is concerned, to the equivalent of trial without information and conviction without indictment. It is foreign to our jurisprudence. "He who steals my purse steals trash, but he who takes my good name robs me of all that I possess"; "a good name is rather to be chosen than great riches". Such a practice is arbitrary, and the fact that it affects an individual person only, in a matter of insurance contract does not decrease its obnoxiousness. If it may be applied to one, it may be applied to all. If a man may be despoiled of both his purse and his good name by findings based on suspicion, in-

ference and indirection, he is indeed helpless, and he may, by argumentative indirection, and upon an issue not made in the pleadings, stand convicted before the business and social community in which he and his family live and in which he gains his livelihood, without that great constitutional guarantee of presentment or indictment of a grand jury. As the Supreme Court said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. * * * It is the duty of the courts to be watchful of the constitutional rights of the citizens, and against any stealthy encroachments thereon."
>
> *Boyd v. United States,* 116 U. S. 616, 29 L. Ed. 746.

REPLYING TO APPELLEES' ORAL ARGUMENT CONCERNING STOCK ON SECOND FLOOR.

Appellees dwelt at great length in their oral argument on the exhibit of the second floor of the factory overflowing with merchandise which they claimed plaintiff had stated was there, but which could not be placed on said floor. In reply to a question of his honor, Judge Denman, Mr. Thornton stated that appellant had positively testified that the quantity of merchandise as indicated by the exhibit, was on the second floor at the time of the fire. We are glad that this matter was brought up, for it demonstrates conclusively, we believe, the unfairness of appellees toward appellant which has existed in every phase of this case.

In reference to the second floor of the factory appellant in this trial testified:

> "I did not visit the second floor Saturday afternoon" (the day of the fire.) (V. I, pp. 486, 448-9.)

That he did not know exactly or approximately, how many bags or how much baled burlap was on the second floor at the time of the fire (V. I, p. 487); that at the hearing on use and occupancy insurance he gave the testimony appearing at V. I, pp. 488-9 of the transcript (V. I, pp. 488-9); this testimony was (V. I, p. 488): "We had *probably* a half million bags * * *"; "We had *probably* two or three hundred thousand yards of baled burlap * * *" and "We had *probably* 100,000 to 150,000 yards * * *" etc. (italics ours) and the statement concludes: "That floor was quite well filled with merchandise." Now, when the foregoing testimony on the Use and Occupancy hearing was read on this trial, appellant testified: "That was always the case, Mr. Thornton; that is where all the material was opened." (V. I, p. 489.)

It is obvious to any one that this last statement of appellant referred only to the next preceding sentence, which was "That floor was quite well filled with merchandise." Yet appellees assumed this was a positive statement as to the quantity of merchandise on the second floor at the time of the fire, and built up their exhibit accordingly. We may assume that appellant's probabilities were ridiculous, but they are not more ridiculous than the attempt of appellees to charge them against him as positive statements of fact.

The testimony above referred to given at the Use and Occupancy hearing should also be considered in

the light of the testimony which immediately preceded it at the Use and Occupancy hearing. Appellant was asked on that hearing to state about how much goods was on hand which had to be moved following the fire.

"Approximately, from memory now?"

His answer was *"Roughly* $100,000.00 worth of goods."

He was asked to "Describe the bulk, so that the appraisers and umpire will get a picture of just what had to be taken out of the building before the repair work could start." (V. II, pp. 562-3.)

Appellant then gave the testimony including the *"probable"* quantities on the second floor which seems to be one of the principal supports of appellees in this case, and which, in view of the circumstance that appellant claimed no accurate knowledge, and was asked to approximate, and specifically did approximate, should have no weight.

We may conclude this matter by stating that appellees have not had the temerity to present this matter at all in their briefs, where its weakness would be readily apparent; but they attempted to present it only on oral argument to give the court an erroneous first impression in its consideration of this case.

FURTHER CONSIDERING THE FAILURE OF APPRAISAL WITH REFERENCE TO TRANSACTIONS BETWEEN APPELLANT AND COLBERT.

Appellees in their oral argument also laid great stress on the fact that appellant had loaned Colbert

money and permitted him to repay it by allowances on transactions between appellant and H. M. Newhall Co., for whom Colbert worked, and that Colbert appeared on appellant's payroll for the month of September preceding the fire for the sum of $250.00; and that Colbert testified that he arranged some fictitious contracts with appellant after the fire.

The testimony as to the alleged fictitious contracts was considered as showing other fraudulent conduct of appellant; the testimony of the payments to Colbert was considered as showing that the failure of the appraisal was due to Colbert and appellant.

The question of fictitious contracts is wholly collateral.

We wish to make it clear to the court that these alleged fictitious contracts formed no part of or basis of appellant's claim in the case at bar. In a claim on Use and Occupancy insurance, not involved herein, said contracts were an item of appellant's evidence. No charge was there made that they were fraudulent or invalid in any respect.

However, in this subsequent and collateral proceeding it is claimed that these contracts were fictitious.

The overwhelming weight of the evidence is that there were no fictitious contracts.

The weight of the evidence is that these contracts (six in number) were genuine. The evidence is as follows:

These six contracts were numbered and dated as follows:

No. 1449	June 20, 1929
1541	July 6, 1929
1542	July 6, 1929
1578	July 26, 1929
1593	Aug. 9, 1929
1602	Aug. 20, 1929

(Defendant's Exhibit HH, V. III, p. 1680.)

These contracts called for material to be delivered to appellant in the months of October and November, 1929, following the fire.

There is a letter in evidence, dated October 22, 1929 (Plaintiff's Exhibit No. 119; V. IV, pp. 1771-3), from Hyland Bag Company to H. M. Newhall Co. in which appellant stated the following:

> "Referring to conversation of yesterday, we have concluded, it undoubtedly will not be possible for us to get our factory in efficient running order before the first of the year and perhaps not until the end of January, so in line with our discussion, we have decided it will be best to sell the early arrival burlaps purchased from you and we therefore ask you to dispose of:"

Then follows the list of the six contracts claimed to be fictitious, and the letter then continues:

> "In regard to various other purchases from your firm covering goods arriving after February first, wish to advise that we do not want to sell these as we will have our factory in running order by the time these burlaps start to arrive—according to our records we have coming from you in addition to the above, as follows:"

Then follows a list of ten contracts for shipment in December 1929, and thereafter. *Each of these ten contracts is conceded by appellees to be genuine.*

The letter then concludes:

> "As you can readily understand, the fire will naturally result in a serious loss to us, for the reason, that although we are covered by insurance, we will lose many valuable customers, who will be forced to go to other bag factories for their supplies while we are down, so we therefore ask you to make every possible effort to sell the six lots of goods without loss to us and we thank you in anticipation of your doing so.
>
> Assuring you, we will appreciate your full cooperation—especially under the circumstances—we await your advices.
>
> Very truly yours,
> Hyland Bag Company,
> (Signed) Richard C. Hyland.
>
> RCH/M"

Mr. Colbert testified that the original of this letter was handed to him, but he didn't know the date, that he didn't put it in the Newhall records but destroyed it. (V. IV, p. 1774.) He remembered calling with Mr. Geo. Newhall upon appellant, he thought the morning after the fire. (V. IV, p. 1777.) That there might have been a discussion of the possibility that they might be able "to defer some shipments or to divert some shipments to assist Mr. Hyland in his predicament at having a fire". (V. IV, pp. 1778-9.)

That the request contained in Mr. Hyland's letter would be perfectly in order if the contracts were valid. (V. IV, pp. 1779-80.)

That Mr. Hyland did not ask him to secrete or destroy the letter. (Plaintiff's Exhibit 119; V. IV, p. 1771.)

That if there were any numbers on the contracts Mr. Hyland selected the numbers. He made out the contracts in his office. (V. IV, p. 1794.) However, Almer Mayo Newhall showed in his testimony that the number of each and every one of these contracts was a Newhall number, though none of the Newhall contracts bearing these numbers were with Hyland Bag Company. (V. IV, pp. 2080-2081.)

As to the alleged fictitious contracts Mr. Hyland testified:

> "I did not, at any time after the fire, or before the fire, ask Mr. Colbert to have certain contracts prepared which could be cancelled, and particularly after the fire, upon which I could predicate the value at which goods could be replaced in making up a proof of loss.
>
> Mr. Colbert did not, at any time, furnish me with blanks of H. M. Newell & Company contracts to make up any contracts for the purpose of submitting them thereafter to Colbert for the checking of prices, or for any other purpose.
>
> I did not at any time have either in my possession or under my control, either at my factory, or at my home, or at any other office or place, any typewriting machine that had type or that employed a ribbon with ink of the character as shown on the insert appearing in Plaintiff's Exhibit No. 136, or of the character of the type as shown in the letter which has been marked 'Plaintiff's Exhibit No. 135; I never have had such a typewriter.

Mr. Schmulowitz. Q. Mr. Hyland, have you personally seen the contracts which have been designated by the numbers 1449, 1541, 1542, 1578, 1593 and 1602?

A. I assume those to be the six contracts?

Q. The six contracts in dispute.

A. Yes, I have seen them."

(V. VI, pp. 3230-3231.)

And again:

"I first saw those contracts in my office. They came in through the mail at various times, they were presented to me after being checked up by Miss Mitchell for my signature. I do not recall at this time by whom they were signed on behalf of H. M. Newhall & Co.

I positively did not fill out any of those contracts. I positively did not cause any of these contracts to be filled out by anybody in my employ, or specifically employ anyone to fill out any of these contracts. Never at any time did I assign numbers to any H. M. Newhall & Co. contracts in my possession at any time. These contracts, except for the signature line in the lower left-hand corner, as shown on Plaintiff's Exhibit 136, were complete. On the various occasions when these contracts came in, I completed these contracts by affixing my signature. These particular contracts positively were not received by me at all at one time after the fire. I at all times believed them to be valid contracts."

(V. VI, pp. 3231 and 3232.)

Miss Georgia Mitchell, factory superintendent, testified in reference to these contracts:

That she saw them; that they came in through the mail; that she kept a record of all contracts and had done so since 1921, and that these contracts appeared upon her record which was put in evidence as Plaintiff's Exhibit No. 154. (V. VI, pp. 3099-3101.) Her testimony was as follows:

> "Whenever a contract, a purchase contract, is made, I listed it in a numerical file which I kept, just for my own use, it was not anything in particular, just to show the number of the contract, to keep a record of it, show who they were purchased from; whenever a contract was received, I gave it a number with a numerical numbering machine, and listed it under this number, and then, if the prices, the quantity, and the terms were correct, I took it in for Mr. Hyland's signature, which I did with every one of these; they did not all come in at one time, they were not all mailed back at one time.
>
> The series of sheets, consisting of thirteen pages which you hand to me with the request that I state when I handed those sheets to you for the first time: I brought them to you at your home on December 1, in the evening, after I had heard of the testimony of Mr. Colbert. They represent a list of our purchase contracts which I started in 1921 and kept up to the present time, and I brought them to you to show you where I had listed these contracts as they came in. As to, what entries I made on these sheets and what data I recorded on these sheets; well, the contract number, I had put in with pen and ink, because the numeral numbering machine I used for numbering the purchase contracts was a single numbering machine, and then after the contract

number, I put the kind of burlap, and the amount, that would be yardage, and letter of credit number, if it were a purchase in Sterling, and if it were a purchase in Dollars and cents, then I used the purchase contract number; I put in the cost, who it was from, and the mill, if it was to be a special mill shipment, and then after it arrived, the stock number that was given to that particular lot, and crossed it off as being completed.

Yes, I started that in 1921. These are all the sheets in Mr. Hyland's office from the time that I started it down to and including the last record that was made. The last record made on these sheets was prior to December 1, 1931, because I have not had it in my possession since then, but it was prior to that, I don't know just when. Yes, in other words, it records transactions up to on or about the date when I brought the sheets to your home.

Finding for you the sheets among these upon which there is any reference to contract numbers 1449, 1541, 1542, 1578, 1593 and 1602: they are here on this sheet. This sheet has the number '19' in the upper left-hand corner, yes, that was my number, the 19th sheet. Yes, I placed that number upon that sheet at your request. As for the red crayon marks upon the sheet: I placed these check marks there at the time that the letter was written cancelling these contracts; I had to complete my file some way, so I put a red crayon mark and wrote the word in 'Cancelled, See R. C. H.', because the letter was by Mr. Hyland, and it would have gone back to the H. M. New-

hall Company file, so I was referring to it in that way."

(V. VI, pp. 3099-3102.)

See also:

(V. VI, pp. 3131-2; 3134-9.)

She further testified that she typed the letter (Plaintiff's Exhibit 119), that she believed that it was October 22, 1929, that she believed she mailed it, that the occurrence was within a day or two after the fire. (V. VI, pp. 3102-3.) The first she had heard about any fictitious contracts was when Mr. Colbert made the statement in court. (V. VI, p. 3104.)

Mr. Almer Mayo Newhall testified that his firm used a typewriter with a special type and a special colored ribbon. (V. IV, p. 2122.) Miss Mitchell stated that Mr. Hyland never had any such machine. (V. VI, pp. 3103-4.)

Mr. R. L. Rowley testified that he saw the alleged fictitious contracts and that as to type and color of ink they were not different from the ordinary Newhall contracts. (V. VI, p. 3282.)

Mr. D. A. Parker testified that he saw these contracts (V. VI, p. 1681), and that they were not different from the ordinary Newhall contracts. (V. VI, pp. 3311-12.)

We believe it is significant that there was no testimony introduced that Newhall & Co. did not receive material such as was called for by these alleged fictitious contracts, and likewise it is significant that they would not permit appellant's accountant to make a

general examination of their records. (V. VI, pp. 3310-11.) Colbert when first on the stand testified he believed there was some contract cancelled. (V. III, p. 1295.)

As against all this evidence tending to show that the contracts were genuine, there is only the later testimony of Colbert that they were fictitious, and the testimony of Mr. Newhall that the Newhall Company records showed that the Newhall Company contracts bearing the numbers referred to were with other persons and none of them were with the Hyland Bag Company.

The circumstances of Colbert's testimony that the contracts were fictitious make his testimony of little weight:

The night previous to testifying that the contracts were fictitious he stayed at the home of Mr. George A. Newhall, Jr. (an avowed enemy of plaintiff) at the request of Mr. Newhall, and he discussed his testimony with Mr. Newhall and came to the court at the request of Mr. Newhall without subpoena. (V. IV, p. 1754.) He was asked if he had been threatened with arrest on any criminal charge, and stated "There was intimation that there might be, there was no threat". (V. IV, p. 1755.)

Almer Mayo Newhall testified:

> "When Mr. Colbert stated in court a few days ago that there were intimations made to him of possible criminal charges, he told the truth. I am telling the truth, I did not do it. Yes, it was done in my presence. Yes, intimations of criminal conduct were made in my presence to Mr.

> Colbert. By Judge Zook. My cousin was present. My cousin participated in some of the conversation, I think so."

Considering the whole testimony as to the alleged fictitious contracts, the overwhelming weight is that they were genuine. The only direct evidence to the contrary is the testimony of Mr. Colbert, who was testifying under intimation of criminal prosecution.

But whether fictitious or valid, the question of these contracts was evidentiary matter, and collateral to any issue in this case. The contracts, even if fictitious and fraudulent, did not tend to perpetrate any wrong or inflict any injury upon the defendants in this case, raised no equity in their favor and constituted no defense herein.

The gratuities to Mr. Colbert.

Defendant's Exhibit JJ (V. IV, p. 1729) shows that on November 19, 1928, Mr. Colbert executed a note to appellant for the sum of $300.00. It appears elsewhere in the evidence that this represented a loan. On July 25, 1929, this loan, with interest, was paid by the allowance of a commission on Newhall contract No. 1194 in the sum of $75.00, by the allowance of a commission on Newhall contract No. 1147 in the sum of $262.50, by the allowance of the sum of $110.00 as a part of a $300.00 credit memorandum on inferior burlap received from Newhall & Co., and a balance of $127.17 was paid to Mr. Colbert by check. This journal entry was approved by appellant by his own signature.

It also appears that in the month of September, 1929, the name of Mr. Colbert appeared on the payroll account of appellant for the sum of $250.00. The exact date that Mr. Colbert received the money does not appear. Mr. Taylor testified that he understood the money was a loan and that it was put through the payroll account out of consideration for the feelings of Mr. Colbert. (V. VI, pp. 3181-2.) Mr. Colbert was never an employee of Mr. Hyland. (Testimony of Taylor, V. VI, p. 3182; Colbert, V. III, p. 1291.)

The gratuities not secret or criminal.

That Colbert received the gratuities from Mr. Hyland is unquestioned. The commissions were simply an easy way of wiping off Colbert's obligation.

Mr. Colbert testified that the intimations of criminal prosecution made against him by the Newhalls. were not based upon the receipt of these commissions.

> "No, it was not in association with these commissions that the statement or intimation was made to me that I might be the subject of criminal charges, because there is no criminal connection with accepting a commission."
>
> (V. IV, p. 1790, Colbert's Testimony.)

Mr. Hyland was among the best of customers of Newhall & Company. (V. IV, p. 2114.) Mr. Hyland had loaned Mr. Almer Mayo Newhall $35,000.00 at one time. (V. IV, p. 2111.)

There was nothing secret about the allowance from Mr. Hyland to Mr. Colbert. They were set forth in

his books. If these allowances were for some evil purpose, it is more likely they would have been paid in cash out in the alley behind O'Leary's barber shop instead of being set forth on appellant's books.

Whether these gratuities were or were not ethical so far as Newhall & Co. are concerned, is not in issue here. The Newhalls did not consider it was unethical or criminal to borrow both money and burlap from Hyland. However, we do say that it is not apparent that Newhall & Co. ever suffered in the slightest from the friendly relations between Mr. Colbert and Mr. Hyland. The one instance in which he thought he might have made a loss by the cancellation of a contract prior to the fire (V. IV, p. 2097) was never in fact a contract at all. (V. VI, pp. 3115-3121.) Mr. Hyland purchased millions of yards of burlap from Newhall & Company.

Failure of appraisal not attributable to acts of appellant.

The question is, what relations have these facts to the issues in this case?

The allegation in the answer of some of defendants to which they claim these facts are related is as follows:

> " 'If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested ap-

praiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

The appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.

The parties to the appraisement shall pay the appraisers respectively appointed by them and shall bear equally the expense of the appraisement and the charges of the umpire.

If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement. * * *

Time for Commencement of Action. No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire.'

Defendants allege that they and the plaintiff failed to agree in whole or in part as to the amount of loss within the time provided in each of the policies, and that these defendants forth-

with demanded in writing an appraisement of the loss, and named a competent and disinterested appraiser, and the plaintiff within five days after receipt of such demand and name notified these defendants in writing of the appointment of an appraiser named by him. The appraisers so named did not agree upon the amount of loss or the sound value or the damage, and did not agree upon an umpire. The appraisement was not had due to the acts of the plaintiff and the appraiser appointed by him, and this action was commenced before compliance by the plaintiff with the provisions of each of said policies of insurance regarding the appraisement of the loss."

(V. I, pp. 48, 49 and 50.)

Competency and disinterestedness of Colbert not in issue.

Under the foregoing answer the competency and disinterestedness of the appraiser appointed by plaintiff is not put in issue. Such competency and disinterestedness is presumed. The contrary is not alleged, and hence cannot be claimed to be in issue.

Colbert was competent and disinterested.

But if competency and disinterestedness were in issue, the issue should be resolved against the appellees. Colbert was a man of years of experience in the burlap business, and hence was thoroughly competent.

Furthermore, Colbert was not financially interested in the outcome of the appraisement, and hence was disinterested within the meaning of the policy.

That he was friendly to plaintiff did not disqualify him. Undoubtedly these policies contemplate that

each party shall appoint someone friendly to his interest. The terms of the policy provide:

> "The parties to the appraisement shall pay the appraisers respectively appointed by them."

Thus the policy provides that the appraiser, in a limited sense at least, shall be the employee of the party appointing him.

The law has been stated thus:

> "The appraiser chosen by each party is supposed and expected in a restricted sense, to represent the party appointing him, and within reasonable limits to see to it that no legitimate consideration favorable to the party so appointing him is overlooked by the other appraiser."
>
> *Dennis v. Standard Fire Ins. Co.,* 107 Atl. 161, 162 (N. J. Eq.).

A very sensible statement in reference to this matter is found in the case of *Whalen v. Goldman,* 115 N. Y. S. 1006 at 1008:

> "The requirement of the policies of insurance is that the appraiser and the umpire should be disinterested. Such appraisers were not in the strict sense arbitrators, and it is not probable that either party to the policies contemplated, in case of loss, that the appraisers should stand absolutely unbiased. It is more than probable that each one selected an appraiser in whom confidence was reposed as an honest man, but that, in case of any difference, his sympathies would incline toward the party by whom he was chosen. It would be expecting too much, in the present stage of progress toward the millenium, to assume that either party contemplated, when entering into the con-

tract of insurance, that the appraisers selected should be absolutely indifferent."

Furthermore, if there was any claim that Mr. Colbert was not a disinterested appraiser, it was the duty of the defendants to have objected to him at the time.

Eaton v. Globe & Rutgers, 116 N. E. 540 (Mass.);

Doherty v. Phoenix Ins. Co., 112 N. E. 940 (Mass.);

26 *C. J.* 426.

It does not appear in the record that appellees have learned any fact which they were not aware of at the time the appraisement was attempted.

Mr. Colbert was not related to plaintiff.

It does not appear that he had formed any opinion on the loss.

It does not appear that he had any prejudice against defendants or in favor of plaintiff, or that he could not have fairly determined the loss.

In fact, he, himself, testified that he "would take no dictation from anybody, but the thing would be settled absolutely on business merits with Mr. Maris and the third party, whoever it might be." (V. III, p. 1291.)

Under the pleadings, then, we conclude that the competency and disinterestedness of Mr. Colbert as an appraiser were not in issue, but if they were in issue, under the facts, it should be held that he was competent and disinterested within the meaning of the policy.

As indicated above, some of defendants alleged that "the appraisement was not had due to the acts of plaintiff and the appraiser appointed by him" and etc.

Fault of appraiser is not fault of person appointing him. Appraisal not a condition precedent to action.

Under a proper construction of these policies here involved, any acts of the appraiser appointed by plaintiff which prevented appraisement are not a bar to plaintiff's action.

In the recent case of *Norwich Union Fire Ins. Soc. v. Cohn,* 68 F. (2) 42 (C. C. A. 10th), under a similar provision, the court upheld the refusal of the trial court to submit to the jury the question whether or not the appraisal failed because of the neglect of the appraiser for the insured. In this regard the court said:

> "Fault of an appraiser is therefore not the fault of the party appointing him."

The policies here involved have exactly the same ambiguity which was referred to in the foregoing case. *Our policies do not require appraisement as an absolute condition precedent to an action for the loss sustained.* Unless the appraisement is a condition precedent, action may be brought without appraisement. *(Hamilton v. Home Ins. Co.,* 137 U. S. 370.) The early California cases cited in the opinion of the court and in the briefs of counsel for appellees were rendered before the adoption of our standard form policies and they have been questioned and distinguished. (See *Winchester v. North British & Mercantile Ins. Co.,* 160 Cal. 1.) The provision for appraisement is for the

benefit of the insurer and must be strictly construed against the company.

"Any provisions of a fire insurance policy seeking to impair the right of the insured to resort to the courts must be strictly construed against the company."

Providence-Washington Ins. Co. v. Kennington, 71 So. 378, 380 (Miss.);

Joyce on Insurance (2nd Ed. V. V, p. 5406);

Winchester v. North British & Mercantile Ins. Co., 160 Cal. 1;

Western Assur. Co. v. Decker, 98 Fed. 381 (C. C. A. 8th);

Spring Gorden Ins. Co. v. Amusement Syndicate, 178 Fed. 519 (C. C. A. 8th).

It does not appear that insurers complied with policy.

Under our policies the insurance company must make the demand for the appraisement, and must *appoint a competent and disinterested appraiser,* before the insured is required to act at all. We might well question in this case whether the insurance companies fulfilled this requirement on their part, for they appointed Mr. Maris, who was regularly employed by the, and, under a number of authorities, not disinterested.

Bradshaw v. Agr. Ins. Co., 32 N. E. 1055 (N. Y.).

"It has been well said that an habitual appraiser is not a disinterested person within the meaning of the arbitration clause in insurance policies."

Hartford Fire Ins. Co. v. Asher, 100 S. W. 233, 234 (Ky.).

If the appraiser appointed by the insurer is not disinterested, or if neither of the appraisers appointed are disinterested, the insured may bring his action.

Hartford Fire Ins. Co. v. Asher, 100 S. W. 233, 234 (Ky.).

The defendants were required to affirmatively allege that they appointed a competent and disinterested appraiser in accordance with the policy as a part of their defense.

> "Non compliance with a condition of the policy making appraisal or arbitration of the amount of the loss a condition precedent to an action on the policy cannot be taken advantage of under the general issue or a general denial; it must be specially pleaded. And the plea must allege the existence of all conditions making an award essential to the maintenance of the action."
>
> 26 *C. J.* 502.

Under our pleading no replication is required, but the defendants' averments are deemed denied.

Equity Rule 31, 28 U. S. C. A. Sec. 723;

Arkansas v. Mississippi, 250 U. S. 39, 63 L. ed. 832.

This denial necessitated proof that the appraiser appointed by defendants was competent and disinterested. There is nothing in the record to show this. In fact, the inference is to the contrary. (V. III, p. 1284.) Maris, defendants' appraiser, was not produced on the trial. If appellees did not prove the appointment of a competent and disinterested appraiser, then they did not establish their defense for

it was incumbent on them to establish this before appellant was required to take any action at all under the policies involved here.

Compliance by the insured with the terms of the policy as to appointing an appraiser was required only after proper action by the insurer. He was not responsible any further. The evidence shows appellant complied with his requirements.

Appellant showed compliance.

He filed his proof of loss, he promptly appointed his appraiser, when required to do so. Thereafter it does not appear that he ever interfered in any particular with the appraisement, and hence it cannot be said that for any reason attributable to him the appraisal failed. Therefore, plaintiff had the right to bring his action.

Although fault of the appraiser is immaterial under the case of *Norwich Union Fire Ins. Soc. v. Cohn,* 68 F. (2) 42 (C. C. A. 10th) above referred to, nevertheless we refer to appellant's brief heretofore filed, pages 67-78 where it conclusively appears, we believe, that Mr. Colbert, appellant's appraiser, made every reasonable effort to agree upon an umpire, *even suggesting any Judge of the Superior Court.*

Loss payable ninety days after proofs of loss filed.

There is still another paragraph in the policy which we believe establishes the appellant's right to bring his action when he did, without regard to appraisement. This paragraph is as follows:

> "Loss When Payable. A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt."
>
> (V. I, p. 313.)

This seems like a definite provision, that without regard to appraisement, whether completed or not, the loss shall be payable in ninety days after the receipt of the preliminary proofs of loss. The preliminary proofs of loss were filed on December 24, and 26, 1929, the ninety days expired on March 25, 1930. Plaintiff's suit was commenced June 23, 1930.

Giving this "Loss Payable" paragraph the construction in favor of the insured and against the insurer, which the law requires, it appears that the loss is payable without regard to appraisement, and plaintiff rightfully brought his action.

Under any view which may be taken of the matter, the defense of the failure of appraisal cannot be sustained to bar appellant's action on these policies.

THE ALLEGED FRAUDULENT MANIPULATIONS OF RECORDS.

Because of the deep interest manifested by the court in the claim, on oral argument, of attorneys for appellees of the fraudulent manipulations of records, counsel for appellant have made a special study of the testimony concerning the books and records of appellant in this case, and after such study, state to the

court that they are entirely willing to rest the appellant's whole case upon the court's determination as to the merits of this claim.

Appellant's freedom from any charge of fraudulent manipulation of his records appears from the following facts:

First: There is not any claim or evidence in the record that appellant ever placed a figure in, or changed a figure in his books, or that he ever directed any one to change his books or place a false figure therein. Except for the approval of the gratuity to Colbert (V. IV, p. 1729), it is not even suggested in the evidence that appellant was ever consulted with reference to any entry in his books. Therefore, so far as any personal charge against appellant is concerned, there is absolutely no basis for any claim of any fraudulent alteration or manipulation of records.

Second: Appellant's claim as set forth in his proof of loss was based upon the first report of Hood and Strong, Plaintiff's Exhibit No. 1. (V. I, pp. 246 to 248.) As to this claim it is admitted that the basis of the calculation was the book inventory of December 31, 1928, which was in the amount of $171,614.36, as testified to by accountant for appellees, after deducting an adjustment of approximately $20,000; "In other words the book inventory as of December 31, 1928, before the adjustment, would be greater than this sum of $171,614.36 to the extent of that adjustment, or somewhere around $191,000.00. That is correct. This figure of $171,614.36 does also represent the physical inventory as of December 31, 1928." (V. V,

p. 2373. Testimony of Leonard Albert Hart, *accountant for appellees.)*

It is obvious, therefore, that even appellees can have no basis of criticism as to the starting point of the calculations made by Hood & Strong to arrive at the apparent inventory as set forth in their first report.

Nor is there claimed in the basis for this report any manipulation of records. The report of Hood & Strong includes their entire calculation, and it is not asserted anywhere that any of their figures are incorrect. We may pass on, I believe, therefore, and assume that there is no fraudulent manipulation of the records claimed in reference to the Hood & Strong report or the proof of loss.

Third: The record in reference to the claim set forth in the amended complaint:

Mr. Hart, the accountant for appellees, sets forth in his testimony that he is familiar with the methods adopted by Hood & Strong in their two reports, including Plaintiff's Exhibit No. 2, which was the basis of plaintiff's claim in his amended complaint. (Testimony of Hart, V. IV, p. 2301.) (Report V. I, p. 248 et seq.) He stated the method as follows:

> "Hood & Strong for their purpose have started with an inventory taken as of May 31, 1929, as per report of Ernst & Ernst, $533,631.50. To this figure they have added the purchases and various charges, customs charges, labor, insurance, cartage and trucking, freight, bank charges on letters of credit, State toll, and * * * from the aggregate of all these figures have deducted the total cost of sales for the period of June 1, 1929

to October 19, 1929, thereby arriving at an apparent inventory at all locations on October 19, 1929; and they have deducted from this apparent (inventory) at all locations, the inventory of October 19, 1929 at other locations, arriving thereby at the apparent inventory at Sacramento Street of $132,947.44."

(Testimony of Hart, V. IV, p. 2302.)

Mr. Hart further testified:

"When we go in and make an audit of the books and records of a concern for the purpose of arriving at an inventory, if we find from the examination of the records that a certified inventory and report has been made by a firm of accountants of standing, ordinarily we probably would accept their certification as the starting point for our work, so that if Hood & Strong, in the preparation of the report for submission either to a client or to a court, started in this case with the certified report and inventory as prepared by Ernst & Ernst, that would be in line with what our own practice would have been under similar circumstances—in line with all sound accounting practice."

(V. IV, pp. 2348-49.)

Again Mr. Hart stated:

"I can only answer that in one way, we did investigate certain entries upon the books of the Hyland Bag Company, but we had knowledge of other investigations that had been made by various accountants, such as Lybrand, Ross Bros. & Montgomery, of whose report I have seen at least, as I recall, four or five, there have been in-

vestigations made by Ernst & Ernst, by Hood & Strong, of whose reports I have seen three, and I have no reason, myself, personally, to doubt that when they make a statement that they have audited the purchases, for instance, that they audit them, I am perfectly willing to take their word for it.

Q. If you find in their report that they have audited purchases and sales, you are willing to accept their assurance of the integrity of those purchases and sales?

A. In so far as the integrity, yes, but not in so far as possibly their method of calculation of costs.

Q. The matters upon which you are not willing to accept the conclusion of other accountants are matters that involve accounting costs and controversial problems?

A. No, they are not.

Q. You are willing to accept their conclusions upon the integrity of the transactions, themselves?

A. I think that they have all done fairly, fairly done their work, fairly well, so far as I know."

From this testimony it appears that the starting point for the Hood & Strong calculations on their second report, which was the basis of appellant's amended complaint, is perfectly proper, and would not be questioned by any good accountant.

Having the certified inventory of Ernst & Ernst of May 31, 1929, then as the starting point, the only possible sources of error would be:

(a) To go back of that inventory and show that something was included therein which should not have been included.

(b) To show that something was included therein and afterwards added in again by Hood & Strong.

(c) Error in calculation.

Under the foregoing headings the appellees claimed that the following items should have been deducted, to-wit: $22,737.12, $7725.00, $9199.13, $300.00 and $1400.00, or a total of $41,361.25. (V. IV, p. 2316.) The items of $9,199.13 and $1400.00 were claimed as erroneous additions in the total inventory of Ernst & Ernst. The items of $22,737.12 and $7725.00 were claimed to be duplications; that is, merchandise counted by Ernst & Ernst and again included by Hood & Strong in their audit. The item of $300.00 is an item of rebate which was erroneously included by Hood & Strong in the value of merchandise sold.

We discuss each of the foregoing items separately.

(1) The item of $9199.13.

It appears from Defendants' Exhibit M (V. II, p. 896) that in arriving at the total inventory of $533,631.50, Ernst & Ernst, in their calculations included the following adjustment No. 22:

"Adjusted overhead applicable to inventory of finished bags $9199.13"

Just preceding this adjustment, however, Ernst & Ernst had made adjustment No. 21 which was a reduction as follows:

"Reversing overhead recorded by the Company preparatory to the following adjustment $15,630.02"

It will be seen, therefore, that Ernst & Ernst, first deducted an overhead of $15,630.02, and then added on an overhead of $9199.13, which they deemed was applicable to the finished bags on hand. It might be said in this regard that it appears that the finished bags on hand amounted to $349,881.23. Hence the overhead included amounted to only 2.64% of the total cost. Whether or not such deduction should be made is purely a problem in accounting. The item was included in the Ernst & Ernst inventory, made a considerable length of time before the fire, and hence had absolutely no relation to the claim of appellant in this case. Even the accountant for the appellees states that he considers the work of the accountants was fairly done. It would seem, therefore, proper to assume that the item was properly included by Ernst & Ernst in their inventory.

The testimony of Mr. Parker, one of appellant's accountants, states:

> "It is correct and accepted accounting practice to include in the cost of manufactured goods the cost of raw material, including in-freight, marine insurance, cartage and trucking and any other expenses incidental to landing the raw material at the factory; in addition to this must be added labor, royalties on patents, depreciation (in this case on machinery), rental of plant, and all other expenses such as heat, light and water, which are incidental to the operation of the plant."

> "Ernst & Ernst, in arriving at the valuation of the inventory as of May 31, 1929 observed these principles and included in the cost of 2,843,899 manufactured bags an item of $9199.13, as representing all manufacturing costs applicable to those manufactured bags other than the cost of the raw material and direct labor. This item represented the very conservative overhead cost of $3.25 per thousand manufactured bags."
>
> (V. VI, p. 3353 and 54.)

It is to be noted that Hood & Strong, in arriving at their apparent inventory of October 19, 1929, amounting to $132,947.44, did not include any factory overhead for the period from the date of the Ernst & Ernst inventory to October 19, 1929, and it is stated that this was at the request of Mr. Hyland. Otherwise it would have been proper for them to have included such overhead. (V. VI, p. 3354; V. I, p. 250.)

It would seem, therefore, that the item of $9199.13 was properly included, but in any event no charge of any impropriety can be attributed because it was included in any claim of appellant.

(2) As to the item of $1400.00.

The accountant for appellees also claims that there should be a deduction of $1400.00 for the following reasons. It appeared that on the inventory at the Sansome Street Warehouse on October 21, 1929, there were 68,000 grain bags under Lot No. 521, and under the heading "1928 Remainder". In this connection the statement of an accountant for appellees was as follows:

"Yes, there is one other reduction: we found from an examination of the Hood & Strong report that there were 68,000 bags, finished bags, grain bags, on hand in the Sansome street inventory on October 19, 1929. From the description placed upon the inventory sheets, it is apparent that these bags have been brought over as a remainder from the 1928 inventory, they are marked '1928 remainder' at the top of this sheet, which I believe has been produced here as an exhibit. If that is the case and these bags that appear in the October 19, 1929 inventory have been brought over from 1928 inventory, it is apparent that they must be included in the May 31, 1929 inventory as taken by Ernst & Ernst, and it is therefore apparent that the unit cost used at October 19, 1929, should be on the same basis as they appear in the Ernst & Ernst inventory as of May 31, 1929. Making a difference of approximately $1400."

(V. IV, pp. 2315-16.)

It was the testimony of Mr. Taylor that this description of these grain bags was erroneous, and that all bags under Lot 521 had been sold. (V. VI, pp. 3190 and 3201.)

Mr. Taylor testified:

"Since Mr. Hart testified, my attention was directed to certain testimony that he gave upon an item of 68,000 grain bags that appeared in the inventory at Sansome street immediately after the fire. At the top of the third page of this summary which has been marked Defendants' Exhibit J, I find a notation in pencil, '1928 remainder.' That was made by me personally. It is not a cor-

rect statement. I have three infallible proofs that that is not correct, that it was an assumption on my part, and should not have been there. The first is Journal Entry 4601. That journal entry has been referred to, but not offered in evidence. Journal Entry 4601 which you show me came from the records of the Hyland Bag Company. That Journal Entry has been inspected and examined by Mr. Hart. On the reverse side of this Journal Entry is a work sheet or memorandum; that work sheet or memorandum was on the reverse side of that Journal Entry when Mr. Hart examined it."

(V. VI, p. 3190.)

"Now, proceeding with my explanation as to why the entry appearing on the October 21, 1929 inventory is an erroneous entry: first is Journal Entry No. 4601, adjusting the under-estimate cost figures during 1928. The fifth item on the small piece of paper on the back reads: $9120.56. That is the difference between the cost of materials $554,613.56 and the estimated cost of sales of $545,493, as it appears on the stock sheet 521—the difference is $9120.56. That $9120.56 wiped the 1928 job off the books entirely. By this entry here being included $20,734.89, there were no more bags, and we closed the account. The next corroboration is the Rosslow inventory of May 31, 1929. There are no bags in 1928, the only ones being 559 of the 1929 manufacture. The other corroboration is the inventory of December 31, 1928, page No. 5, the detail list of all of the accounts used in closing out the domestic $10,488.74. The only domestic bags mentioned are three bales

of green bags that had been left over for several years in our job No. 534. So there were no 1928 grain bags on hand at that time."

(V. VI, p. 3201.)

"In addition to matters heretofore disclosed by me, I have other matters to which I can refer in aiding me to identify the 68,000 patched and darned bags as belonging to Lot 559 of 1929 manufacture, rather than Lot No. 521 of 1928 manufacture. These patched and darned bags were all made from a lot of inferior material we received from the Ludlow Manufacturing Company. It ran into quite a vast volume of poor cloth, it ran into a claim of many thousands of dollars, with which Cerf & Cooper are very familiar, and understand the whole detail of. That inferior material was received commencing with January 1929. That is an additional circumstance that allocates that to 1929, absolutely."

(V. VI, p. 3222.)

In view of the foregoing testimony it would seem that the claim of the accountant for the appellees is based upon a mistake and that this item of $1400.00 should not properly be deducted. The whole basis of appellees' account's claim was the assumption that the 68,000 bags referred to were carried over from 1928. He was misled in this regard by Mr. Taylor's error in describing them as 1928 remainder. We believe that Mr. Taylor satisfactorily explains his error. Hence this deduction should not be made.

(3) As to the item of $22,737.12.

The appellees claim that there was a duplication in reference to this item; that the item represents 150 bales of merchandise which was counted in the certified Ernst & Ernst inventory of May 31, 1929, and that it was included by Hood & Strong in their audit as a purchase subsequent to May 31st and prior to October 19, 1929.

The testimony of Mr. Hart showing the position of appellees is as follows:

> "Q. Now, Mr. Hart, I call your attention to Defendants' Exhibit M, and I call your attention particularly to an item appearing on Defendants' Exhibit M—that is Mr. Rosslow's work sheet, for your information, of Ernst & Ernst—of $22,737.12, and ask you if you have made a study of that item, or a purchase represented by that item?
>
> A. I have.
>
> Q. What does that item represent in the way of burlap, Mr. Hart?
>
> A. Those items represent 150 bales, 300,000 yards of 37-10 burlap.
>
> Q. Now, did you find, Mr. Hart, that that item of that particular shipment of 300,000 yards or 150 bales was included by Mr. Rosslow and duplicated by Hood & Strong as a purchase subsequent to May 31, 1929?"

With realization that the burden of proof is on plaintiff-appellant to prove the loss on this item of $22,737.12, we say frankly that there is a conflict of testimony on this item. If it is a duplication, appellant is not entitled to it and desires no benefit therefrom. As will hereinafter appear, it could not be definitely de-

termined by Ernst & Ernst or Hood & Strong, or Mr. Taylor, or Mr. Parker, that it was a duplication, but on the other hand it could not be established certainly that it was not a duplication. The accountants put in much time and study concerning it. Whether it is a duplication or not has no bearing upon the question of false swearing, for it is an accountant's error, but if the court finds that it is a duplication the claim in appellant's amended complaint should be reduced in this amount.

The facts are these:

The work sheet of Ernst & Ernst showing computations and reconciliations of ledger inventory and actual inventory of May 31, 1929, shows adjustment No. 20, material on hand but not inventoried, Lot 2199, H. M. Newhall, $22,737.12. (V. II, p. 896, Defendants' Exhibit M.) This adjustment is also shown as inventory on dock. (V. III, p. 1356, Defendants' Exhibit L.)

A portion of the work sheet of Ernst & Ernst in reference to this item also appears elsewhere in the record. (V. III, p. 1592, Defendants' Exhibit EE.)

The item hereinbefore referred to is claimed to be the same 300,000 yards of burlap invoiced by H. M. Newhall on June 20, 1929, and paid for by appellant by voucher No. 1865, July 27, 1929, under Newhall contract of April 3, 1929 (V. III, pp. 1319-1321, Plaintiff's Exhibit No. 87); this invoice of June 20, 1929, and the payment of July 27, 1929, also appears in the testimony of Almer Mayo Newhall. (V. IV, pp. 2082-3.) The payment was, however, $24,187.33, after deduction of a credit memorandum of $300.00 (V. IV,

p. 2083); Mr. Rosslow of Ernst & Ernst testifies that the invoice for this particular shipment which represented adjustment No. 20 had not been entered, the goods were actually there, but no entry was in the books for the invoice. (V. II, p. 916.)

Mr. Rickards of Hood & Strong, a certified public accountant, who did the work preparatory to the report, Plaintiff's Exhibit 2 (V. III, p. 1161; V. I, pp. 249-251) stated the procedure of Hood & Strong was as follows:

> "My attention being directed to page 3 of our report of October 21, 1930, and to the third item from the bottom of that page, we assert apparent inventory October 19, 1929 of $196,620.21. That amount was developed as follows: we start with an inventory certified to by Ernst & Ernst as of May 31, 1929 of $533,631.50. That represents the inventory on hand on May 31, 1929, and the executed inventory in transit but not received. We add thereto purchases from June 1, 1929, to October 19, 1929; customs charges for a similar period; direct labor on manufacturing bags for a similar period; insurance for a similar period; cartage for a similar period; freight for a similar period; bank charges on letters of credit for a similar period; State toll for a similar period; and arrive at a total of $1,173,384.40, representing goods to be accounted for. We find that the cost of the goods sold out of that total to be accounted for amounts to $976,764.19; therefore, deducting the cost of the goods sold from the total cost of the goods to be accounted for, we arrived at an apparent inventory on October 19, 1929, of $196,620.21.

Mr. Schmulowitz. Having arrived at that figure and having ascertained that the landed cost of the inventory of merchandise at 1328 Sansome Street as of October 19, 1929, was $63,672.77, what did you do to ascertain the quantity of merchandise at 243 Sacramento Street as of October 19, 1929?

A. We deducted the physical inventory taken at other locations than 243 Sacramento Street from the total inventory arrived at, at all locations, and arrived thereby at the inventory at 243 Sacramento Street.

Q. And that figure is represented by what sum?

A. $132,947.44."

If there is duplication in the item of $22,737.12, it occurred from the fact that Ernst & Ernst in their inventory of May 31, 1929, included goods which were not invoiced by Newhall until June 20, 1929; and Hood & Strong, adding to the inventory of May 31, 1929, subsequent purchases, naturally included these goods invoiced on June 20, 1929. It is plain that error could have occurred and if it did, it may have arisen from the fact that prior to the trial Mr. Rickards had not seen the work sheets of Ernst & Ernst (V. III, p. 1173), although after seeing the work sheet he stated that he was unable to identify the item of $22,737.12 with any of the purchases included in the Hood & Strong report. In this regard his testimony was as follows:

"Referring again to Defendants' Exhibit M, and to adjustment No. 20, by reference to that adjustment, and by reference to the other data

appearing upon that work sheet, that item involved in that adjustment of $22,737.12 apparently is included in the figure with which I started of $533,631.50. Yes, I have added to that figure last mentioned total purchases between May 31, 1929 and October 19, 1929, of $639,752.90. I have sought to determine whether any of the purchases included in that last-named figure are duplicated in the item involved in Adjustment No. 20. I am quite unable to identify the item contained in Adjustment No. 20 with any purchases that we have included in our report. I have been able to identify every purchase that we have included in the aggregate figure of $639,752.90. And from that I say that the aggregate of the purchases included in that figure is not a duplication of the item involved in Adjustment No. 20."

(V. III, p. 1210.)

He further stated that this shipment was divided into three lots he believed, Lot 2187 (V. III, p. 1238, Defendants' Exhibit U) and Lot 2200. (V. III, p. 1384; V. III, p. 1210.)

The Newhall invoice of June 20, 1929, showed the same markings as stock sheet 2199. (V. III, p. 1212.)

In the purchases from June 1, 1929, to the day of the fire, Mr. Rickards included 300,000 yards under these three lot numbers. In this regard he testified as follows:

"Q. And in your purchases from June 1, 1929, to the day of the fire you included the 300,000 yards of burlap under these three lot numbers?

A. Most assuredly I did, the invoice was dated June 20, and it would be foolish to think that any

one would have possession of goods for three weeks before billing them with it.

No, I did not know that Mr. Rosslow had included a correction in his statement of $22,737.12 for Lot No. 2199, H. M. Newhall, at the time of the preparation of our last report of October 13, 1931. I did not know that until I came into Court. I knew it when I was trying to locate that item of $22,000. Mr. Rosslow was there working with me part of the time. As to his telling me that was the item he had included, he could not identify it."

(V. III, pp. 1212-13.)

Without pursuing this matter further, we say that Ernst & Ernst may have included in their certified inventory of May 31, 1929, a shipment of 300,000 yards of burlap which were in the process of being received at that time, but for which no invoice had been entered, that Hood & Strong in their audit of purchases and sales from May 31, 1929 to October 19, 1929, included as goods received subsequent to May 31, 1929, the 300,000 yards previously counted and included in the Ernst & Ernst inventory.

If this duplication occurred, probably both firms of accountants are in part chargeable with the error. It is certain, however, that appellant had nothing to do with it, and there was no effort on his part except to procure an accurate report.

We refer the court to the following testimony in the record, showing the statements of the various witnesses in this regard:

In the first place, Mr. Hyland testified:

"I was not doing my own bookkeeping. That set of books had originally been installed by Klink, Bean & Co., of which Mr. Cooper, now of the firm of Cerf & Cooper, was the manager. I relied on that set of books being sufficient to take care of our requirements. I was not operating the books personally. That was in full charge of Mr. Taylor."

(V. I, p. 500.)

Again he testified:

"Answering your question as to whether I am and have been personally familiar with the bookkeeping system and with the records maintained by the Hyland Bag Company, I have never at any time had anything whatsoever to do with the bookkeeping. We had an accountant, Mr. George P. Taylor, in whom I had absolute faith and he was given full charge and I permitted him to run his department."

(V. I, p. 266.)

Then as to the second employment of Hood & Strong, he testified:

"We had employed the firm of Lybrand, Ross Bros. & Montgomery, the auditing firm, to do some work for us which we felt should be done on the use and occupancy hearing. During the progress of this investigation which was in charge of Mr. D. A. Parker as Lybrand's senior accountant, certain discrepancies were disclosed. Mr. Parker spoke to me about these and he stated that it would be a good idea to have Hood & Strong, who had formerly done some work for us, at the

beginning, or shortly after the fire, make a further survey, or investigation, of it. That was the reason for employing Hood & Strong in the second instance. In other words, I acted on the suggestion of Mr. Parker."

Again referring to this second report, he testified:

"Subsequently, in 1930, we called upon Hood & Strong to make another report. I do not recall the exact date. Yes, it was subsequent to the filing of our original complaint in which we set forth a loss of $76,000. I cannot answer your question as to whether there were any other records available to Hood & Strong in 1930. I certainly instructed Mr. Taylor to turn over what records they required to have the work done. That is all. I had nothing whatever to do with the details of it. I do not recall at this moment the reasons for again employing them. I do not recall the details of the claim set forth in our amended complaint; I know the claim was increased and filed. I had nothing whatever to do with the making up of these claims, or the details of them. I verified all of them, assuming that the men in charge of this work were dependable and inasmuch as I could not do it personally there was nothing else for me to do. To some extent, yes, it did cause some curiosity on my part that our claim had been increased by $35,000. As to my personally making any investigation to satisfy my curiosity as to the reason for raising the claim, *I had the accountants go over the books to find out the exact condition of our affairs; based upon their report, a new claim was filed.* That is all I can tell you."

(V. I, pp. 514-15.)

Elsewhere the reason for the increased claim, as shown in the amended complaint appears. Thus in the testimony of appellant, Defendants' Exhibit B, the following appears:

> "Claim increased from original proof of loss 73,000? to present claim, because H. & S. audit and this audit found the first claim understated and therefore we amended it to present amt."
>
> (V. I, p. 440.)

Again he states:

> "Answering your question why if we had such records did we employ Hood & Strong, *my reason for employing Hood & Strong was that I wanted to be absolutely certain beyond any possible doubt that the amount we had claimed was correct.*"
>
> (V. I, p. 513.)

Appellant set forth in his amended complaint in reference to his increased claim

> "That since the said preliminary proofs of loss were filed, the plaintiff has ascertained more accurately the actual damage suffered by him."

The statements of appellant are corroborated by the testimony of the accountants.

As to the second report which was the basis of the claim in the amended complaint, the testimony of Edward H. Lamont was as follows:

> "Yes, I received instructions to prepare the next report, the one of September (October), 1930, Exhibit No. 2. I received those instructions from Mr. Hyland. The instructions were

verbal. The conversation took place in Mr. Hyland's office. I believe in the fall of 1930, and present were Mr. Rickards, of my own office, Mr. Parker, an accountant in the employ of Mr. Hyland, and Mr. Hyland, himself. The instructions were that here was an inventory as certified by Ernst & Ernst as of a certain date, and using that as a basis to audit the purchases and sales and compute an inventory as of October, whatever the date is. Yes, that in September, 1930—was the first time I learned that there had been a physical inventory taken by Ernst & Ernst as of May 31, 1929."

As to this report the testimony of Frederick W. Rickards of Hood & Strong was as follows:

"As to the instructions that I received when I went down to the Hyland Bag Company in October of 1930, I was informed that we had prepared a report sometime previously on the gross profit percentage basis, there being at that time apparently not available any physical inventory. I was told that it was since discovered and developed through the auditor of Messrs. Leiber, Ross Bros. & Montgomery, that there was available a physical inventory taken by Messrs. Ernst & Ernst as of May 31, 1929; that this inventory was fully certified to and that I could use that as a basis for the *preparation of more accurate figures.*"

It is apparent, therefore, that the entire purpose of the second report of Hood & Strong was to start on the firmer foundation of the certified inventory of Ernst & Ernst, and to prepare a more accurate claim

than that represented by the first report of Hood & Strong. There is positively nowhere in the whole six volumes of testimony from end to end, any suggestion that appellant attempted to procure other than the most accurate reports possible.

If this item of $22,737.12 is a duplication, it is simply a duplication by mistake and not otherwise.

(4) As to the item of $7725.00.

Appellees also claim there should be deducted from the apparent inventory of Hood & Strong (Plaintiff's Exhibit 2, V. I, pp. 249-251), which was the basis of appellant's claim in his amended complaint, an item of $7725.00 representing the value of 50 bales of burlap. In this regard the claim of appellees is set forth in the testimony of their accountant, Mr. Hart.

> "Yes, I have had occasion to study the records of the Hyland Bag Company at other places relative to certain 50 bales of 37-10 burlap purchased from H. M. Newhall & Co., arriving in San Francisco on the steamship 'President Jefferson' in April of 1929. Yes, as a result of my efforts I have been informed when this burlap was received by the Hyland Bag Company. We were compelled to go to outside sources in order to establish to our own satisfaction that this material or merchandise was actually received by the Hyland Bag Company in the month of April, 1929. In order to establish it to our satisfaction, we were shown a copy of a letter from the Dollar Steamship Company wherein the date of the delivery was shown of this merchandise to the Hyland Bag Company. We also inspected other

documents, delivery orders from the H. M. Newhall Co., and after such inspection we were satisfied it was received in April, 1929. You show me Defendants' Exhibit QQ, being a letter from the Dollar Steamship Company of November 17, 1931, addressed to Thornton & Watt, yes, this is the letter I had reference to. That letter does show that a delivery of this 50 bales was made on April 25 and April 26, 1929, to the Hyland Bag Company. Yes, that was over a month prior to Mr. Rosslow's report and his figuring. Yes, I did find from my studies that this same item of 50 bales that was received in April was included by Hood & Strong as a purchase of goods subsequent to the 31st of May and prior to the day of the fire. Answering your question, what have I in mind—the invoice of purchase that was included by Messrs. Hood & Strong? the invoice, as I recall, I have not familiarized myself with that. The invoice from H. M. Newhall in amount which was $15,450, covering 100 bales of 37-10 burlap, consisting of two different lots of 50 bales each, one from the Steamship 'President Jackson' and one from the Steamship 'President Jefferson'. Plaintiff's Exhibit 88, H. M. Newhall & Co. invoice of August 6, 1929, referring to 50 bales of 37-10 AB mill burlap ex 'President Jefferson' is the invoice I have reference to. That is correct, it is my testimony that Hood & Strong included as a purchase subsequent to May 31, these goods which were delivered to the Hyland Bag Company on the 25th and 26th of April. The amount of the item reflecting these 50 bales is $7,725. In my opinion, this sum of $7,725 should be deducted from the total of $132,947.44 found by Hood & Strong."

According to the testimony of Mr. Taylor, the material included in this item was first stored for H. M. Newhall & Co. (V. VI, pp. 3182-4.) Then it was used by permission of Newhall & Co. in lieu of a portion of the shipment from the steamer "Silver Elm" which was defective. (V. VI, p. 3183.) This defective shipment is the one concerning which the duplication is claimed in reference to the item of $22,737.12. Subsequently the defective material was also purchased. (V. VI, p. 3183.) He testified that neither lots No. 2187, Defendants' Exhibit U (V. III, p. 1238), nor lot No. 2200, Plaintiff's Exhibit 96 (V. III, p. 1384), appeared on the Ernst & Ernst inventory of May 31, 1929. (V. VI, p. 3185.)

The testimony of Mr. Taylor upon this matter is supported by the testimony of Almer Mayo Newhall, a witness for defendants, and by Plaintiff's Exhibit No. 135. (V. IV, pp. 2122-4.)

Mr. Parker, one of appellant's accountants made a very careful analysis of this transaction (V. VI, pp. 3347-3352) and stated that this item was not included in the Ernst & Ernst inventory of May 31, 1929 (V. VI, p. 3350), and therefore the inclusion of this item by Hood & Strong as a purchase subsequent to May 31, 1929, and prior to the date of the fire is a correct inclusion, and cannot possibly be a duplication, and should not be deducted from the Hood & Strong inventory. (V. VI, p. 3350.)

We believe a careful examination of this matter demonstrates the fact that there is no duplication of this item of $7725.00, and that it should not be de-

ducted from the Hood & Strong report of apparent inventory on which plaintiff's amended complaint was based. (V. I, pp. 249-252; Plaintiff's Exhibit 2.)

(5) The item of $300.00.

The testimony of the accountant of appellees as to the item of $300.00 is as follows:

> "As to whether there are any other deductions which, in my opinion, should be made from this total found by Hood & Strong, there is an item of $300 covering a credit memorandum that was issued by H. M. Newhall & Co. to the Hyland Bag Company that should apply as a reduction of the cost of the burlap that was purchased in the item represented by 150 bales, 300,000 yards of 37-10 burlap. That was not treated by Hood & Strong in the preparation of their report."
>
> (V. IV, p. 2315.)

The conclusion of Mr. Parker, one of appellant's accountants, after study, was as follows:

> "I admit there should be deducted the credit of $300.00 referred to by Mr. Hart."
>
> (V. VI, p. 3359.)

It appears that Hood & Strong in calculating the cost of burlap received from May 31, 1929, to October 19, 1929, the day of the fire, included the total original cost and made no allowance for a credit memorandum for $300.00 issued for defective material, and should therefore, have been deducted from the cost of material in their calculations. This could not be other than an oversight on their part.

(6) The claimed fraudulent changes in stock sheets.

The appellees refer to Plaintiff's Exhibit No. 98 Stock Sheet 2199 (V. III, p. 1393) to Defendants' Exhibit U, Stock Sheet 2187 (V. III, p. 1238), to Plaintiff's Exhibit No. 96, Stock Sheet 2200 (V. III, p. 1384), and to Plaintiff's Exhibit No. 84, Stock Sheet 559 (V. III, p. 1309), and claim that the changes thereon are fraudulent, and they refer to the loose leaf sheets used by appellant in his business.

We believe that it is common practice among corporations doing a large business to use a loose leaf system, but in any event it would seem that, using such a system, if any one desired to make false entries they would not make alterations upon the face of the record, but the old record would have been destroyed and an entirely new record, which contained the entries desired, would be made up.

These various exhibits were altered. They were altered by Mr. Taylor, appellant's bookkeeper. When he was first upon the stand he had forgotten the transactions upon which the sheets were based, and could not fully explain them. (V. III, pp. 1463-64.) However, later his mind was refreshed and he recalled the transactions. We believe that how the confusion arose, and exactly how the changes occurred, appear in his testimony (V. VI, pp. 3182-3), and in the testimony of Miss Georgia Mitchell. (V. VI, pp. 3115 and 3122.)

There was considerable confusion in the transactions involved under these stock sheets. The facts of the matter seem to have been as follows:

That 50 bales of burlap arrived by the Steamer "President Jefferson" about April 17, 1929, under Newhall contract No. 9486. The appellant claimed that he had not agreed to purchase this material, and it was stored for Newhall & Co.

Another 50 bales of burlap arrived about June 4, 1929, under the same contract, by the Steamer "President Jackson", which was also stored for Newhall & Co.

In the meantime, at the end of May or the first of June, 150 bales of burlap arrived by the Steamer "Silver Elm", which the appellant had purchased. This material, however, was found to be defective, and so appellant was permitted to use the two 50 bale lots which he was storing for Newhall & Co., in lieu of the 100 bales of the defective material. This defective material was then held in storage for Newhall & Co. Later, in the month of July, this 100 bales of defective material was purchased by appellant from Newhall & Co.

These transactions are covered by Stock Sheets 2187, 2199 and 2200. The 150 bales which was admittedly purchased was invoiced to appellant on June 20th. The arrival of the material before the invoice date evidently contributed to the confusion for some of the changes in the Stock Sheet 2199 were evidently made to conform to the invoice dates.

We ask the court to particularly consider the testimony of Miss Mitchell and Mr. Taylor, to which we have referred in connection with these claimed fraudu-

dent entries. With this confusion of transactions, we believe it is clear that any confusion in the stock sheets cannot possibly be attributed to any fraudulent purpose.

Conclusion upon the question of fraudulent manipulations of records.

We have discussed above every item which the accountant for appellees claimed were erroneously included in the apparent inventory of Hood & Strong, which was the basis of appellant's claim in his amended complaint. We ask the court in all fairness is there any basis whatsoever for any claim that appellant did not act honestly and in good faith in this matter?

First. It is apparent that the suggestion of Hood & Strong's report, Plaintiff's Exhibit No. 2, arose not from appellant but from an employee of a reputable accounting firm, Mr. Parker of Lybrand, Ross Bros. & Montgomery;

Second. The instructions of appellant to Hood & Strong were to use as a basis the certified inventory of Ernst & Ernst of May 31, 1929, and audit purchases and sales thereafter to the date of the fire, and produce a more accurate report of his inventory than that which appeared in their prior report, Plaintiff's Exhibit No. 1, and which was obviously an estimate;

Third. Even the accountant for appellees testified that the method of arriving at this second report and basing it upon the certified inventory of Ernst &

Ernst, was in accordance with sound accounting practice;

Fourth. The accountants for appellant concede in this report that there was one error of $300.00, and it was obviously an oversight in calculation of the cost of merchandise;

Fifth. Except as to the item of $300.00 and the item of $22,737.12, we believe the evidence shows that the report of Hood & Strong, Plaintiff's Exhibit No. 2, is correct;

Sixth. That as to the item of $22,737.12, there may be a duplication and if so this is a proper deduction from the said apparent inventory as shown by Plaintiff's Exhibit No. 2. We point out, however, that Mr. Rosslow of the firm of Ernst & Ernst was unable to identify this item as a duplication, that Mr. Rickards of Hood & Strong could not identify the item as a duplication, and Mr. Parker, formerly of the firm of Lybrand, Ross Bros. & Montgomery was definitely of the opinion that the deduction of this item as a duplication was not justified. Mr. Taylor, appellant's bookkeeper, testified that he kept true books, and there were no false entries therein (V. III, p. 1474), and that he had assisted several auditors and placed at their disposal all information and data (V. III, p. 1380) and that he could not determine the matter. (V. III, pp. 1508-9.) Counsel for appellant on the trial stated that everything possible on the particular item had been placed before the court and he felt that until it was possible to demonstrate that there was a duplication, there was doubt as to that item

(V. III, p. 1581); and during the course of the trial counsel for plaintiff suggested that the court appoint an entirely independent accountant to examine plaintiff's books, "it being the desire of plaintiff to obtain no more and no less than the amount to which he is justly entitled as reflecting his loss as of the date of the fire". (V. III, p. 1296.) The court at first decided to follow this suggestion (V. III, pp. 1297, 1424) but later and finally, upon objections of counsel for appellees, stated that he would defer the appointment of a master until after the testimony was in, and none was ever appointed. (V. III, p. 1591.) We have pointed out in appellant's brief heretofore filed, not only that appellant was not in personal charge of the factory at the time of the fire, but even if he had been, its size and the vast quantity of merchandise on hand would have made it necessary for him to rely on accountants; his own bookkeeper stated that he had no accurate inventory, and from his own observations of ashes and debris, appellant believed that something was burned up.

What was more reasonable than to call in certified public accountants to audit his records and determine what was, or should have been on hand, and what more reasonable than to rely upon the reports of these accountants who reported to him: "We have developed the sum of $132,947.44 as being, in our opinion, a conservative valuation of the merchandise on hand at 243 Sacramento Street, at the close of business, October 19, 1929." (Plaintiff's Exhibit No. 2, Report of Hood & Strong on which plaintiff's amended complaint was based. V. I, p. 250.)

Assuming a duplication occurred, is it going to be charged to an attempt to defraud by Ernst & Ernst represented by Mr. Rosslow; by Hood & Strong, represented by Mr. Lamont and Mr. Rickards; by Mr. Parker, or by Mr. Taylor; or were all of these gentlemen acting together in an attempt to defraud? Isn't it true, rather, that any duplication, if it occurred, was simply a human mistake? All human action involves the possibility of human error, and it would have been phenomenal if no mistakes had occurred in appellant's books. The appellant did his best to prevent mistakes in his claim by employing reputable certified public accountants to furnish him an accurate report. That the report may have been in part erroneous should not be considered for a moment as a cause of forfeiture of his entire claim.

And we again repeat, that appellant never placed a figure in, or changed a figure in his books, and never directed or suggested to any person that any false entry or change be made therein.

FURTHER DISCUSSING THE QUESTION OF FALSE SWEARING.

The claimed false swearing as to plaintiff's knowledge as to the origin of the fire.

The alleged false swearing of plaintiff as to the *origin* of the fire was not discussed in appellant's brief heretofore filed for the reason that the trial court apparently held that any false swearing in this respect was immaterial and was not intended to deceive, did not accomplish any deceit, and the decision against appellant was not based upon this ground.

The court's statement was:

> "Since the evidence of incendiarism was equally well known to both plaintiff and defendants, and plaintiff knew that, there was no deception accomplished and perhaps none intended. I do not believe that this defense would alone justify a denial of recovery to plaintiff."
>
> (V. I, p. 179.)

The appellant under the law of California was not required to communicate to the appellees his judgment from the evidence that the fire was incendiary. At the time of the fire, Sec. 2570 of the Civil Code of California, provided:

> "Sec. 2570. Matters of Opinion. Neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question."

Under this provision of law, appellant was not required to express his judgment and opinion or any evidence that indicated that the fire was incendiary.

Moreover, any expression on his part as to incendiarism was absolutely immaterial, for appellees, through their organization, the underwriters fire patrol, and through their adjusters, knew every fact, and perhaps more than appellant, about the incendiarism. The statement of appellant that the origin of the fire was unknown to him is not found to have been intended to deceive, it did not deceive, and under the circumstances it could not have deceived. Hence it was not false swearing as a matter of law.

> "The untrue statement, in order to avoid the policy, must have been knowingly and inten-

tionally made by the insured with knowledge of its falsity, *and with the intention of defrauding the company.*"

Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 398, citing

Clarke v. Phoenix Ins. Co., 36 Cal. 168;

Helbing v. Svea Ins. Co., 54 Cal. 156 (35 Am. Rep. 72);

Greiss v. State etc. Co., 98 Cal. 241 (33 Pac. 195);

West Coast Lumber Co. v. State Ins. Co., 98 Cal. 502 (33 Pac. 258).

The appellant unless he set the fire or saw it set, however persuasive the evidence of incendiarism, was legally swearing to the truth in stating that the origin of the fire was unknown.

Jones v. Howard Ins. Co., 22 N. E. 578.

The alleged false swearing in the amended complaint.

The claim of defendants in this regard was that plaintiff swore that his loss was $106,000.00 when he knew it did not exceed $35,000.00.

This claimed false swearing was not specifically and separately considered in appellant's brief heretofore filed. There were three reasons for the omission:

First. It was deemed that it was covered by the discussion of the claimed false swearing in the proof of loss, and that there was no false swearing in fact. (Appellant's Brief pp. 19-36.)

Second. Filing a verified complaint cannot be deemed false swearing within the meaning of the

policy provision for forfeiture for fraud and false swearing.

Third. In the final analysis the trial court apparently rested its decision on false swearing in the proof of loss.

We take this opportunity of considering this question of false swearing in the amended complaint and set forth briefly the foregoing matters in reverse of the order stated:

Third: The trial court rested its decision on false swearing in the proof of loss.

On denying petition for a rehearing the trial court apparently brushed aside any other basis or reason for its decision and elected to rest its decision on false swearing in the proof of loss. In this regard the court stated:

> "Second, in order to avoid any possible misunderstanding, I find that plaintiff was guilty of wilful and intentional fraud and false swearing *in making his proofs of loss.* The petition for a rehearing is denied." (Italics ours.)
>
> (V. I, p. 233.)

From this language it would seem that the alleged false swearing in the amended complaint was not a basis for the decision of the trial court.

Second: Filing a verified complaint is not in law false swearing within the meaning of the policy provision for forfeiture for fraud and false swearing.

The section of the policy pertaining to forfeiture for fraud and false swearing does not apply to a claim for

an excessive amount in a complaint filed in an action, nor to false testimony upon a trial. After the parties have been unable to settle a loss and it has become necessary for the insured to seek the aid of a court, the parties are dealing at arms length, and the insured owes no further duty to the company under the policy. The provision of the policy for forfeiture for fraud or false swearing has reference to claims and representations made under oath to the insurer in investigating the loss and while the parties are attempting to adjust it. It cannot be intended to refer to a sworn complaint or to testimony in a case for these representations are made to the court and not to the insurer. That such is the intent and meaning of the provision in the policy of insurance is indicated by reference to Section 549 of the Penal Code which counsel state the Legislature adopted "as a further expression of its intentions and the meaning of this provision". Nothing in the section indicates its application to a verified complaint or to testimony in a case.

That the provision for forfeiture for fraud and false swearing does not apply to an excessive claim in a complaint or to false testimony in the case has been held in a number of cases.

In the case of *Goldberg v. Provident Washington Ins. Co.,* 87 S. E. 1077, 1079 (Ga.), the Supreme Court of Georgia reversed a judgment for defendant and held that a wilful misstatement of fact by the plaintiff on the trial of a claim in the complaint for property which he knew was not damaged or destroyed, or overvaluations knowingly made by plaintiff on the trial were not grounds for forfeiture.

The exact language of the court after quoting the provision of the policy similar to the one relied on in the case at bar was as follows:

> "And the court gave certain instructions to the jury, especially in those portions complained of in grounds 12, 13 and 14 of the motion for a new trial, which, while in part authorized under the provisions of the policy just quoted and under the evidence in the case, were too broad, in that they in effect instructed the jury, or contained language from which the jury might infer, that a willful misstatement of fact by the plaintiff on the trial in regard to the value of the property insured, or even a claim in the petition filed in the suit to recover for property known by the plaintiff not to have been damaged or destroyed by the fire, or overvaluations knowingly made by the plaintiff in the trial of the case, for the purpose of collecting more money than he is entitled to, were grounds of forfeiture of the policy. We do not think that the clause of the policy under consideration had so broad a scope. It did not make perjury on the part of the plaintiff in giving testimony on the trial a ground of forfeiture; nor do we think that under it a mere overclaim, though knowingly made, in the plaintiff's petition, would work a forfeiture. But it related rather to proofs of loss and other statements made under oath by the plaintiff, and other such preliminary matters involving dealings between the insured and the insurer, such as statements or representations made by the former to the latter in regard to the damages or losses claimed to be covered by the policy. It would cover cases of fraudulent misrepresentation of material facts or circumstances,

made by the plaintiff to the company or its agents, that might affect the action of the insurer in respect to settling or adjusting the claim of the insured, but would not cover, as said above, an exaggerated claim of loss made in the petition, or perjury committed by the plaintiff during the trial."

In reference to a similar provision the Kansas City Court of Appeals of Missouri used the following language:

"We think the provision of the policy last quoted, so far as it has reference to matters occurring after the loss, refers to misrepresentations, fraud, and false swearing made by the insured to induce the company to pay the loss, that is fraud, committed while the loss was being investigated by the company to determine whether or not to pay the loss, and has no reference to matters arising after the company's refusal to pay the loss, and suit has been filed. The false swearing of McAninch in his deposition was after suit was filed, and at that time the parties were dealing with each other at arm's length, and there was no legal duty upon McAninch to relate the true circumstance surrounding the giving of this mortgage. He had a perfect right to treat the matter in any way he desired after defendant refused payment and suit was brought and until he was placed under oath on the witness stand. Then if he committed perjury, the policy did not cover that."

Third National Bank v. Yorkshire Ins. Co., 268 S. W. 445, 449.

In the case of *Dietz v. Providence Washington Ins. Co.*, 11 S. E. 50, 58, the Supreme Court of West Virginia referring to a similar provision for forfeiture stated:

> "The rights of the parties must be determined as they existed when the suit was commenced, and no affidavit of John K. Keitz made after that time could affect the rights of the owner of the property. After the company had denied its liability under the policy, they could not take advantage of the breach of any of the conditions thereof made after action commenced. No false swearing after the suit was instituted could change the rights of the parties as they stood when the writ issued."

In the cases where anything contrary to the foregoing rule has been stated, the statement will be found to be purely obiter, or based upon a different policy provision, or not well considered.

First: There was no false swearing in fact in the amended complaint.

In appellant's brief heretofore filed in discussing the alleged false swearing in the proof of loss, it is demonstrated, we believe, that there was no false swearing by plaintiff in law or fact in his proof of loss. Without actual knowledge, or the possibility of actual personal knowledge of the amount of his loss, his claim was based upon an estimate of his stock on hand made by accountants. The calculation and method thereof was given to defendants before the proof of loss was filed, and was made a part of the

loss. The method was reasonable, there was no possibility of deceit, and the claim could not constitute false swearing.

The claim in the amended complaint was based upon what was intended and expected to be a more accurate report of accountants since it was based upon an audit, and the claim in the proof of loss was not. The method was reasonable there was no possibility of deceit, and hence the claim could not constitute false swearing.

The discussion of these matters in appellant's brief pp. 19-36, to which we ask the court to refer, is also applicable to the claimed false swearing in the amended complaint. It was supposed, however, that the claim in the amended complaint was more accurate than the claim in the proof of loss, since it was based upon an audit, while the claim in the proof of loss was not. For a full consideration of the basis of the amended complaint, whereby it appears that there was no false swearing in fact, we also ask the court to refer to the discussion of the claimed manipulation of records of appellant pp. 30-57 of this brief.

Any claim of forfeiture for false swearing by the amended complaint herein is ridiculous, both in law and in fact.

Claimed false swearing in the testimony.

The authorities hereinbefore cited which show that there can be no forfeiture for claimed false swearing in a pleading in a case, likewise holds that no for-

feiture can be had for false testimony. We again refer to these authorities:

Goldberg v. Provident Washington Ins. Co., 87 S. E. 1077-1079 (Ga.);

Dietz v. Providence Washington Ins. Co., 11 S. E. 50, 58;

Third Natl. Bank v. Yorkshire Ins. Co., 268 S. W. 445, 449.

It would be absurd to hold that a forfeiture should be granted because a trial court did not believe some testimony of the plaintiff in the case. To permit such forfeiture would place every insured at the arbitrary mercy of the trial court, and without effective remedy by appeal.

We point out, moreover, that in the case at bar there is no specification of testimony of appellant which the court finds was false, and upon one of the principal issues, the question of whether or not there was any out of sight loss, the court sustained appellant and found there was some out of sight loss, and thereby necessarily found that the witnesses for defendants were (we'll have the consideration to say) mistaken.

Under the law and facts it cannot be held there is any forfeiture in this case by reason of any testimony in the case.

Further on the law of false swearing.

The policies here involved are the standard form under the law of California, and were executed and de-

livered in California, and the law of California is applicable.

Aetna Life Ins. Co. v. Geher, 50 F. (2) 657 (C. C. A. 9th).

The law of California on the question of forfeiture for fraud and false swearing requires that the sworn statement:

1. Be made by the insured.

(Terms of policy provide: "Fraud or false swearing by the insured.")

Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 398;

Singleton v. Hartford Fire Ins. Co., 127 Cal. App. 635, 646.

2. The false statement must be "knowingly and intentionally made".

Pedrotti v. Am. Nat. Fire Ins. Co., 90 C. A. 668, 671;

Raulet v. Northwestern etc. Ins. Co., 157 Cal. 213, 236.

A negligent or careless statement is not false swearing.

"The question of negligence is not involved. The law favors the insured to the extent of excusing a careless statement if it does not proceed from a fraudulent and wilful intent."

Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 400 (hearing denied by Supreme Court).

A statement false by mistake or inadvertence does not amount to false swearing.

3. The statement must be made "with the intention of defrauding the insurer".

Pedrotti v. Am. Nat. Fire Ins. Co., 90 C. A. 668, 671;

Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 398;

West Coast Lumber Co. v. State Inv. & Ins. Co., 98 Cal. 502, 510.

4. A discrepancy in the loss claimed and the loss proved raises no inference of false swearing.

Helbing v. Svea Ins. Co., 54 Cal. 156, 159;

Clarke v. Phoenix Ins. Co., 36 Cal. 168, 176.

The discrepancy does not cast the burden on the insured to establish that his statement was not intentionally false.

Singleton v. Hartford Fire Ins. Co., 127 Cal. App. 635, 646;

Helbing v. Svea Ins. Co., 54 Cal. App. 156.

5. The false statement must be false in reference to a material matter.

26. *C. J.* 516.

6. The defense of fraud or false swearing is an affirmative defense and must be specially pleaded.

Greiss v. State Inv. & Ins. Co., 98 Cal. 241;

Capuro v. Builders Ins. Co., 39 Cal. 123;

26 *C. J.* 499.

7. The burden of proof as to alleged false swearing is on the insurer.

26 *C. J.* 516.

"The burden of proof in establishing the defense interposed is upon the defendant. Fraud is not to be presumed. It must be affirmatively shown."

Oshkosh Packing & Prov. Co. v. Mercantile Ins. Co., 31 Fed. 200, 206.

8. If such a state of facts is presented as leaves a reasonable presumption of mistake or misapprehension on the part of the person charged with false swearing, such presumption should be indulged in preference to that of wilful false swearing.

West Coast Lumber Co. v. State Inv. & Ins. Co., 98 Cal. 502, 511;

Singleton v. Hartford Fire Ins. Co., 127 Cal. 635, 647.

9. The statement must have been such that it could have deceived.

A statement which is a mere estimate, or upon a matter upon which defendants are fully informed, is not false swearing.

Helbing v. Svea Ins. Co., 54 Cal. 156;

Maher v. Hibernia Ins. Co., 67 N. Y. 283, 292.

"A mere wilfully false statement will not work a forfeiture of a policy of insurance, under a condition that 'all fraud or attempt at fraud, by false swearing or otherwise' should cause such forfeiture, when such false statement could not deceive the insurance company to its injury."

Shaw v. Scottish Commercial Ins. Co., 1 Fed. 761.

THE LAW OF CALIFORNIA IS STRONGLY OPPOSED TO FORFEITURES.

Conditions involving forfeiture must be strictly construed.

Civil Code, Sec. 1542.

Contracts providing for liquidated damages are unenforceable unless the damages suffered would be impracticable or extremely difficult to ascertain.

Civil Code, Sec. 1671.

> "A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty."
>
> *Ebbert v. Mercantile Trust Co.,* 213 Cal. 496, 499.

> "Here the plaintiff had sustained no damage at all, and it would seem to violate all rules of honesty and fair dealing to allow him to take from the defendants the large sum claimed."
>
> *Eva v. McMahon,* 77 Cal. 467, 472 (action to recover agreed liquidated damages).

In another view of this case it may even be said that the provision in these policies of insurance for forfeiture for fraud and false swearing have no application to proofs of loss, but that any false swearing to be a ground of forfeiture must be in reference to some matter entering into or pertaining to the contract of insurance itself. In this regard the view is that upon the occurrence of a loss, the right of the

insured becomes vested, and his rights in California cannot be forfeited for any statements thereafter pertaining to the loss. None of the higher courts of California have passed on this question, but so far as we have been able to ascertain it has not been necessary for them to do so. We do not believe there is any case in California reports where the insured has been deprived of his insurance by false swearing as to his loss.

The provisions in the policies in the case at bar cover false swearing relating to the insurance or the subject thereof. A reasonable construction is that the fraud or false swearing, though it may be done after the loss, must concern the insurance or the insured property before the loss. Nothing is said about a false claim or proof of loss. If there is any uncertainty or ambiguity, the contract should be construed to avoid a forfeiture.

> "It is well established that conditions which provide for a forfeiture of the interest of the assured or other persons claiming under the policy are to be strictly construed against the insurance company, and if there is any ambiguity in a policy which may reasonably be solved by either one of two constructions, that interpretation shall be adopted which is the most favorable to the assured."
>
> *Welch v. British Am. Ins. Co.,* 148 Cal. 223, 226;
>
> *Globe & Rutgers, Fire Ins. Co. v. King Foong Silk Filature,* 18 F. (2) 6 (C. C. A. 9th).

THE LAW OF CALIFORNIA IS STRONGLY IN FAVOR OF WAIVERS OF FORFEITURE.

In a large number of decisions pertaining to insurance, the courts of California have indicated their favor toward the waiver of any forfeiture cleamed against the insured.

In the case of *Faris v. American National Ins. Co.*, 44 Cal. App. 48, 56, the court states:

> "The forfeiture provision of the contract was solely for the benefit of the insurer, and as such could be waived by the company if it chose to do so. It is true that the policy provided that the insurance should ipso facto cease and determine upon the default of the insured, but nevertheless by the decisions of the Supreme Court of this State it has been held that under similar provisions, if the Insurance Company, after knowledge of said default, enters into negotiations or transactions with the assured which recognize the continued validity of the policy and treats it as still in force, the right to claim a forfeiture for such previous default is waived."

In the case of *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 448, a case of claimed forfeiture by reason of increased hazard, the Supreme Court of California reversed the judgment of the trial court and held the claimed forfeiture had been waived and quoted with approval the following language from 3 Cooley's Briefs on Insurance, page 2657:

> "If an insurance company, with knowledge of facts vitiating a policy, by its acts, declarations, or dealings leads the insured to regard himself as protected by the policy, or induces him to incur

trouble or expense, such acts, transactions, or declarations will operate as a waiver of forfeiture, and estop the company from relying thereon as a defense to an action on the policy."

It is well settled in California that forfeiture clauses of an insurance policy may be orally waived.

Linsky v. Scottish Union, etc. Ins. Co., 68 Cal. App. 688, 689.

Citing:

Bank of Anderson v. Home Ins. Co., 14 Cal. App. 208, 213;

Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 447;

McCollough v. Home Ins. Co., 155 Cal. 659, 664;

Faris v. American Nat. Ins. Co., 44 Cal. App. 48, 58;

Farnum v. Phoenix Ins. Co., 83 Cal. 246, 261;

Raulet v. Northwestern Ins. Co., 157 Cal. 213, 233;

Knarston v. Manhattan Ins. Co., 140 Cal. 57, 63.

"Provisions in an insurance policy are always construed so as to prevent a forfeiture, if the language will reasonably permit such a construction."

O'Neill v. Caledonian Ins. Co., 166 Cal. 310, 315.

In the case of *Young v. California Ins. Co.,* 46 P. (2) 718, decided last year, the Supreme Court of Idaho held that where the insurer specified certain objections to the proofs of loss and did not specify false swearing until their answer in the action, the defense was waived.

The language of the court is as follows:

"Appellants nowhere, if we correctly read the correspondence, based their non-liability and so notified respondent, upon false and fraudulent statements made in the proofs of loss, but upon other grounds, and first urged their non-liability, predicated upon fraud and false swearing in the proofs of loss, in their answer in this action. In such circumstances appellants are not permitted to avail themselves of the defense of fraud or false swearing, the rule being that only specified defects can be relied upon as a defense and others, not specified are waived.

'An insurer, by specifying a certain or particular defect or defects in proofs of loss, waives all other defects therein. And since a requirement that notice of loss be given is for the purpose of enabling the insurer promptly to investigate, such notice is waived where the insurer sends its local agent and adjuster to examine the property, and later objects to the proofs of loss as furnished, but does not mention the fact that the notice was oral, and not written as required by the policy * * *. The rule that only specified defects can be relied on as a defense, and others not specified are waived, also applies where insurer notifies insured that it refuses settlement for 'noncompliance' with the contract time for filing proofs, and other reasons * * *. 7 Couch Cyclopedia of Insurance Law, Sec. 1593, p. 5593.' "

To same effect see,

Ward v. Queen City Fire Ins. Co., 67 Ore. 347, 138 p. 1067.

REPLYING TO APPELLEES' BRIEFS.

A. REPLYING TO BRIEF OF APPELLEE, WESTERN INSURANCE CO. OF AMERICA.

Pages 2-3. The maxims "he who seeks equity must do equity" and "he who seeks equity must come with clean hands," have no application against appellant in this case.

Defendants must rely upon their interpretation of a forfeiture provision in an insurance policy, and otherwise have no defense.

Phoenix Ins. Co. v. Moog, 78 Ala. 284, 302.

Pages 4-7. This is a fair statement as to the nature of the action.

Pages 7-8. The reference to the insurance carried is sufficiently covered by appellant's brief, pages 62-66. Appellees' own representative testified there was nothing extraordinary about a fluctuating stock being over insured. There is no showing that there was any other over insurance.

Pages 9-13. Though we do not know, we have written our briefs on the assumption that the fire was of incendiary origin, the amount of damage was disputed.

Pages 13-16. As to the extent of the fire, the testimony was conflicting. It seems valueless to enter into this conflict. Be it said that the official report of the San Francisco Fire Department made at the time of the fire shows that it was much more serious than would appear from the oral testimony of the firemen given two years later. (Plaintiff's Exhibit 168; V. VI, pp. 3376-8.) A contemporaneous newspaper account

also showed it was a serious fire. (Plaintiff's Exhibit 123; V. IV, pp. 1948, 1951.)

Pages 16-28. We agree that the figures stated show correctly the book valuations at the time of the fire. This is Taylor's testimony. We do not agree, however, that it was necessary for appellant to assume the correctness of this figure when his own bookkeeper testifies that the actual inventory was always much greater than his books, and Mr. Smith, the representative of several appellees himself stated that book inventories were unreliable. This matter is covered in appellant's brief pages 29-33. Even if it should be now demonstrated as a fact that appellant had less than $90,000.00 worth of goods on hand in his factory by actual inventory as distinguished from his books, this shows no false swearing.

Pages 28-43. The statement of the accounting method used by Hood & Strong to arrive at the value of merchandise at the Sacramento Street plant is satisfactory. Appellee is incorrect in assuming that by a similar method the values at Sansome Street in their first report would have been $77,853.45 (p. 28), or in their second report $108,347.66. (p. 32.) This assumption would be correct only if the actual physical inventory at the Sacramento Street plant were $88,272.55. This cannot be assumed.

As to the errors of accountants criticized by counsel, we can only quote the testimony of their own accountant given later in the trial:

> "I think they have all done fairly, fairly done their work, fairly well, so far as I know."
>
> (Testimony of Hart; V. V, p. 2391.)

As to claimed duplications, we ask the Court to refer to this brief, supra, pages 32-53.

Pages 43-45. Again we refer to the question of duplications in this brief supra, pages 32-53.

Counsel are in error as to the starting basis of the first Hood & Strong report of November 29th, whereby values of $102,453.22 were calculated. This calculation was made after deduction, or without adding in, the adjustment of $20,734.89. This is shown by their own accountant. (V. V, pp. 2373-4.)

Pages 46-76. We refer again to the discussion of duplications in this brief, supra, pages 32-53.

It may be that there was a duplication of the item of $22,737.12, though it could not be definitely determined after much investigation. We believe the evidence shows definitely that there was no duplication in any other item.

If there is a duplication, there is not one word in the evidence, nor any suggestion that it is attributable to any act of appellant.

Pages 76-88. Appellant's proof tended to show:

1. The value of the material on hand at the time of the fire.

2. The value of the material remaining after the fire.

3. The amount of damage to the material remaining after the fire.

The difference between the value of material on hand at the time of the fire and that remaining after-

wards was deemed to be burned up or out of sight loss.

Plaintiff believed material was burned up in the fire. No one could state accurately what was on hand before the fire, therefore, plaintiff had to depend on accountants to determine this fact.

Although there was much *swearing* by Smith and Radford and other witnesses for the insurance companies that nothing was burned up, there was plenty of evidence that there were ashes and burned cotton and burlap materials hauled out after the fire. Evidently the trial court believed that the witnesses for the insurance companies were not telling the truth in this regard for the court *found there was an out of sight loss.*

Appellees' calculations as to the merchandise which would have been represented by the debris are ridiculous. We never claimed, and no witness testified, that all the debris hauled away was merchandise debris.

Pages 88-102. Any over-grading or over-pricing of merchandise on the Radford inventory was to the benefit of appellees and could not, even if knowingly done, constitute false swearing. (There is nothing in the evidence to indicate that any over-grading was other than merely a mistake, perhaps Radford's, the employee of appellees; or that any over-pricing was other than by mistake or in accordance with an understanding between Sugarman, appellant's adjuster, and Smith, adjuster for some of appellees.)

We demonstrate this in the following manner:

The court finds the value of the stock at the time of the fire was $88,000.00. (V. I, pp. 178-79.) While we believe this amount is too low, we assume that it is correct for our present purpose.

The court also finds that the out of sight loss is the difference between the Radford inventory and the value of the stock before the fire, and the court finds this is approximately $2,000.00. (V. I, p. 185), and the Radford inventory is in round figures $86,000.00.

Now, whatever the price or grade of the merchandise remaining after the fire, the percentage of damages would be the same, and let us assume that the percentage of damage to all merchandise remaining, whether due to fire, water, smoke or chemicals, was 50%.

The calculation of appellant's loss then would be as follows:

The Radford inventory was the merchandise salvaged from the fire.

Value before fire	$88,000.00
Radford inventory	86,000.00
Difference—out of sight loss	$ 2,000.00
50% damage on Radford inventory	43,000.00
Total damage	$45,000.00

Now, let us assume that through over-grading and over-pricing, the Radford inventory was greater than it should have been, and that actually it should have been only $80,000.00 instead of $86,000.00.

The calculation is then as follows:

Value before fire	$88,000.00
Radford Inventory (Eliminating over-grading and pricing)	80,000.00
Difference—out of sight loss	$ 8,000.00
50% damage on Radford inventory after correction	40,000.00
Total damage	$48,000.00

It is thus a mathematically demonstrable fact that any errors of over-pricing or over-grading of merchandise in the Radford inventory was beneficial to appellees, since the more the inventory of remaining goods was over graded or appraised the less would be Hyland's loss.

As we have elsewhere shown, the question of out of sight loss was in conflict. The weight of the evidence was that there was an out of sight loss and the court so found.

Pages 102-108. The percentage of damage to the salvaged merchandise was a mere guess on the part of anyone. After the Radford inventory was completed, Mr. Ben Sugarman placed opposite each item his estimated percentage of the damage thereto.

> "The percentage of damage that I estimated was the damage to that value in those lots as Radford had inventoried them. That was intended by me to be an estimate, that was my judgment."
>
> (V. II, p. 987.)

A document showing Sugarman's estimated percentage of damage to the items on the Radford inventory was received in evidence as Defendants' Exhibit P. (V. II, pp. 1006-07.) Sugarman mentioned "that every item in the building was damaged some." (V. II, p. 1007.)

Whatever difference may exist as to the percentage of damage given by Sugarman and the witnesses for appellees cannot be put down to anything but a difference in opinion.

The actual loss sustained by appellant was determined by the auction sale which the court holds "was apparently consented to by the insurance companies." (V. I, p. 191.) This auction was held several months after the fire, but in the meantime appellant had been required to hold the goods for the benefit of the insurance companies, and hence it is in entire accord with justice that the burden of expenses and price declines in the meantime should fall on them.

Assuming the auction determined the damage to plaintiff, this damage is the difference between the net proceeds thereof and the inventory, plus the out of sight loss. The Radford inventory was $86,807.98; the net proceeds of the auction sale were $27,742.32. (V. III, p. 1661.) The difference is $59,065.66, which represents the loss on salvaged merchandise, and to this must be added the out of sight loss which at the low figure found by the court was at least $2,000.00. *It thus appears that appellant's total damage was at least $61,065.66.*

Pages 109-122. We refer the court to our reply to pages 76-88 of appellees' brief, supra, this brief pages 76 to 77, for a consideration of claimed over-grading and over-pricing. It appears conclusively that any over-pricing or over-grading of the Radford inventory was beneficial and not harmful to appellees, and could not have been fraudulent.

Moreover, it is absolutely impossible to read all the testimony pertaining to the pricing and grading and state that anything was knowingly and intentionally and fraudulently over-priced or over-graded. Appellant may have been negligent in not closely examining the proof of loss which was filed.

> "The law favors the insured to the extent of excusing a careless statement if it does not proceed from a fraudulent and willful intent."
>
> *Miller v. Firemen's Fund Ins. Co.,* 6 Cal. App. 395-400.

Pages 123-130. The whole matter of the claimed "Fictitious contracts" has been discussed supra this brief, pages 10-19 to which we ask the court to refer.

There were no fictitious contracts, and the overwhelming weight of the evidence is that there were not.

Pages 130-134. This portion of appellees' brief presents as baseless an attack upon a litigant and a witness as the writer of this brief has ever experienced. We ask the court to read the entire testimony of Mr. Hyland, commencing with V. VI, pp. 3257-3261 on direct examination, and the entire cross-examination on the same subject matter from V. VI, pp. 3289-3310,

and see that the witness was attempting to answer to the best of his ability every question put to him.

The subject matter pertained to prices. Mr. Logie testified to prices on behalf of defendants. These prices covered a portion of the material in the Radford inventory. Bemis prices had also been introduced. Mr. Hyland made notes of the prices testified to by Mr. Logie, which even counsel for appellee conceded were substantially correct. (V. VI, p. 5309.) Mr. Hyland then repriced the Radford inventory after corrections for errors in grades on his own prices, on the Logie prices, and on the Bemis prices. He did not reprice any items except those which Mr. Logie gave a price on.

Because he set forth exactly what he did in his direct and cross-examination, the appellee uses it as a basis for reflection and insinuation against him. It was obvious throughout the trial that Mr. Hyland had not a good memory for figures. This appeared at the very beginning of the trial where he referred to a memorandum and stated that he could not remember the figures without it. (V. I, p. 243; V. I, p. 245.)

We again refer the court to pages 81-83 of this brief, wherein it appears that any overvaluation of the Radford inventory was beneficial to the appellees and detrimental to appellant, and could not have been fraudulent.

Pages 134-139. As to the auction sale, it is apparent that there is no criticism of its fairness, or that the highest price obtainable was not received for the

damaged stock. The court below was apparently of the view that it was consented to by Smith, adjuster for some of appellees, as a method of determining the loss. Smith was the head of the adjusters and whatever he did was agreeable to the others. Since the delay in disposing of the damaged merchandise was caused by the requirements of the insurance companies, the auction sale was a fair method of determining the loss.

Plaintiff did sell out to the Pacific Bag Company in January, 1930 (Plaintiff's Exhibit No. 166; V. VI, p. 3266), but this matter was never even thought of before the fire. (V. VI, p. 3236.) The suggestion came from Mr. Sugarman. (V. VI, p. 3265.) The negotiations were started in December, 1929. (Testimony of Sugarman, V. VI, pp. 3089, 3088.)

In view of this testimony, the insinuations in reference to the sale and the fire are nothing less than contemptible.

Pages 139-142. As to the claim of this appellee to a limited liability, we refer the court to pages 46-68 of the brief for Dubuque Fire & Marine Ins. Co., et al, for reply.

Pages 142-145. We are not in disagreement with the law stated.

Pages 145-154. For our consideration of the law of false swearing, we refer the court to appellant's brief, pages 23-25, and this brief supra pages 63-65.

Most of the authorities cited have no pertinency to this case.

The question of fraud is not involved as a defense but only false swearing.

In California, the claimed sworn false statement must be material, must be wilfully and knowingly false, must have been intended to deceive, and must have been capable of deceiving. A negligent or inadvertent statement will not constitute false swearing.

An excessive claim in a pleading or false testimony will not cause a forfeiture.

Nor will a false statement by an agent, cause a for-forfeiture. It must be the act of the insured.

The law of California is particularly strong against forfeitures, and favors a waiver thereof. The question has never been directly decided by our appellate courts, but the inclination of the California courts makes it likely that they would not hold that an excessive claim after loss could constitute false swearing under the provisions of the policies here involved.

As a matter of law or fact we do not believe that false swearing can be predicated upon a claim which is made in reliance upon and in accordance with a report of certified public accountants.

Pages 155-166. To appellant's brief, pages 8 to 18, we add the following:

Application of the general rule cited that findings of the chancellor based on conflicting evidence are presumably correct, and will not be set aside unless a serious mistake of fact appears, should cause this court to disregard the claimed findings in this case.

We believe that we have shown in appellant's brief thirty pages of condemnatory argument are not findings in accordance with Equity Rule 70½.

Many serious mistakes of fact and law appear therein. As one instance of fact, we refer to the court's statement that "if the quantity of merchandise claimed to have been obliterated, had been in the factory at the time of the fire * * * the building * * * would have been taxed with a load beyond its capacity." (V. I, p. 193.) Counsel now admit that this statement, argument, or finding is erroneous. (Brief of Western Insurance Co. of America, p. 186.) That such a prejudicial statement is not correct, removes the presumption of correctness from other statements in the opinion.

We point out also that on the substance of this case showing the basis of appellant's claim, arrived at through the reports of excellent and reputable accountants on which he relied, there is no conflict in the testimony.

Pages 166-170. We have repeatedly pointed out that any over-pricing or over-grading was beneficial to appellees.

Appellee claims that waiver of false swearing should have been pleaded. This is not the law.

Plaintiff is required only to plead performance of conditions precedent on their waiver.

False swearing is an affirmative defense.

No replication is permitted. It is deemed denied, and the plaintiff under the denial can show any facts

which will overcome the defense. Equity Rule 31 provides for this, and the practice is so well known that no citation of authority is required.

Pages 171-174. The omission to discuss the appellant's claim in the amended complaint to which counsel refers has been remedied by consideration in this brief, supra, pages 62-68.

The matter of pricing and grading has been fully considered.

The claim of appellant for an out of sight loss, denied by appellees, is fully justified by the finding of the court that it did sustain an out of sight loss.

Of course, no one could say exactly what the burned up merchandise consisted of, because no one knew exactly what merchandise was in the plant before the fire.

Pages 174-176. Appellee again returns to pricing and grading, the immateriality of which has been fully considered.

The circumstances of this case show that plaintiff had to rely on reports or accounts of others.

Let us suppose that appellant's books had shown an inventory of $200,000.00, and appellant had filed a claim on that basis. Appellant would then have been criticized for not having an audit and report of certified public accountants. Now, because he did have an audit and report of certified public accountants, apparently he is criticized for using their report.

Pages 176-178. We do claim that there were no suspicious circumstances surrounding this fire so far

as appellant is concerned. We have assumed that the fire was incendiary, but the insinuations against appellant are unjustified and contemptible.

Pages 178-182. As to the statement of counsel that appellee was not permitted to examine plaintiff's books, we refer only to the statement of thir own accountant:

> "When I first examined the books Mr. Taylor gave me every assistance. As to our investigation during the Use & Occupancy, apparently we were not prevented from looking at any of the books or records of the Hyland Bag Co. at all. We were not limited in our examination."
>
> (Testimony of Hart, V. IV, p. 2325.)

This examination occurred immediately after the fire.

Apparently, appellees knew much more about appellant's books than appellant himself knew.

Pages 184-187. The matter of claimed over-pricing and grading, and the immateriality thereof has been heretofore fully demonstrated.

Pages 187-192. As we understood the finding of the court referred to, it was a personal criticism of appellant for testifying to one thing, and then testifying to the opposite at another point in the trial. As we have pointed out, appellant never claimed that his books were accurate, nor did he claim them to be inaccurate. He left that necessarily to accountants to determine. Hood & Strong said they were adequate and evidenced proper accounting. (V. I, p. 247.) Evidently Ernst &

Ernst thought they were sufficient. Mr. Hart for appellees deemed they were inaccurate.

B. REPLYING TO BRIEF FOR APPELLEE, MILLER'S NATIONAL INSURANCE CO.

This brief differs only slightly from the brief of appellee, Western Insurance Co. of America. The appellee, Western Insurance Co. of America claimed, pages 139-142, that it was not here liable under its particular policy, and it did not demand appraisal. Appellee Miller's National Ins. Co. demanded appraisal and on pages 174-179 discusses the failure of appraisal. We believe that this matter is fully covered in this brief, supra, pages 9-30, and in appellant's brief heretofore filed, pages 67-76, and we ask the court to refer thereto.

In no other respects is the brief of appellee, Miller's National Insurance Company different from that of appellee, Western Insurance Company of America, and therefore, for our reply to other matters in the brief of Miller's National Insurance Company we refer the court to our reply to the brief of Western Insurance Company of America.

C. REPLYING TO BRIEF FOR APPELLEES, DUBUQUE FIRE & MARINE INSURANCE COMPANY, ET ALS.

Pages 2-8. The insinuated incendiarism of appellant designed to prejudice this court has been referred to in this brief, supra, pages 3-7.

Why should this court believe that the insurance companies attempted to reach an adjustment, or that appellant only pretended to?

There is not one word of evidence that Hyland ever notified a single person not to give out prices, and while Smith claimed he could not obtain prices and that appellant did not give his cost prices, the testimony of appellees' own accountant was that he was not prevented from looking at any of the books and records of appellant. (V. IV, p. 2325.) No physical inventory was suppressed and none was taken at the plant four days before the fire (V. II, p. 761), etc.

It is impossible in the time permitted to prepare this brief, to reply to all the misstatements and vituperation directed at appellant.

We are aware that appellees burn with the consuming fire and unrighteous wrath of insurance companies striving to evade payment of a just obligation. We know that this court will be guided by a just consideration of the record.

In connection with counsel's insinuations, we ask the question, If there had been anything improper or not bona fide as to appellant's claim, would he not have settled it as quickly as possible, and plucked the fruits of his wrongdoing?

The matter of the appraisal has been fully considered in appellants' brief, pages 67-76, and in this brief, supra, pages 9-30.

The amount of damage to the salvaged stock is disputed and was never determined, except by the auction sale. This auction sale was at the suggestion or with the agreement and consent of Mr. Smith, adjuster for some of appellees, and its bona fides has never been questioned.

The questions of alleged false swearing are elsewhere fully considered.

As to the claim that the findings will not be set aside, etc., we have pointed out that there are really no findings in this case, but if they are deemed findings it is conclusively apparent that the chancellor labored under serious mistake, both of fact and law, and the presumption which ordinarily attends them is swept away.

Pages 8-23. Appellee attempts to uphold the opinion of the trial court as findings by selecting a paragraph or sentence here and there. We ask the court to consider what is omitted, as well as the excerpts made by appellee.

Even by selection in the manner stated, we believe it is apparent that as findings the opinion of the court does not comply with Equity Rule 70½. The issues are not correctly stated, findings are not made directly upon the principal issue, the claimed findings are argumentative, and much of the opinion concerns matters not in issue. We ask the court to refer to appellant's brief, pages 8-18, wherein the matter is sufficiently covered.

We have demonstrated that any over-pricing or over-grading was immaterial to appellees, supra, pages 81-83, nevertheless we add that there is not any evidence of any kind in the record that appellant ever suggested any over-grading or over-pricing or that he ever suggested to or solicited from any accountant or any other person an untrue or exaggerated statement, or that he ever placed a figure in his books or on his

records, or suggested the placing of any incorrect figure therein. If he ever swore to an untrue statement, it was by reliance on others and through mistake of accountants. Neither mistake or negligence constitute false swearing.

It is an absolutely untrue statement to say that appellant ever suppressed any record.

The amount of appellant's damage was in dispute, and that is what caused this action.

Pages 24-25. The law of false swearing has been elsewhere fully considered. We refer to appellant's brief, pages 23-25, and this brief, pages 69-73.

We ask this court to note particularly that appellee cites no California cases, and it is the law of California which should be applied in this case.

Pages 26-34. We do not believe it is worth while to go into the conflicting testimony as to the extent of the fire. The firemen did a good job and deserved and received great credit. Chief O'Neil testified:

> "On coming in on the alarm of the fire we thought we would lose the building, and then it was just a question of confining the fire." (V. IV, p. 1849.)

The official report of the fire department of San Francisco indicated that it was more serious than counsel for appellees seem to state in their brief. (Plaintiff's Exhibit 168; V. VI, pp. 3376-8.) This report shows that the fire lost four hours after the fire apparatus arrived and 26 officers and 113 men were used. That the low pressure hose was in use for two

hours. However, arguing on this matter we believe is fruitless, so likewise is consideration of such questions as to the extent of water in the basement, or the smell of kerosene in the building.

Pages 35-48. In this section appellees consider:

(a) Appellant's knowledge of his business; changes in stock cards.

(b) Claimed wrongful acts of employees.

(c) Claimed contradiction in appellant's testimony and conflict with testimony of others.

(d) Claim that appellant responsible for any wrongful acts of his employees.

Although these matters have been covered, at the risk of repetition, we refer to them briefly at this point:

(a) Reference to appellant's knowledge of his business and criticized changes in inventory stock cards.

Apparently from the fact that appellant bought most (not "all" as appellees claim) of the raw materials used in his factory, and did all the selling, and was familiar with the forms used in his business, appellees would charge him with a detailed knowledge of the merchandise on hand in his factory (which he indisputably was not personally managing) at the time of the fire. The ridiculousness of such contention must be obvious to this court. Appellant was doing a business of over $2,000,000.00 per year. His stock was divided between his factory and a warehouse. It totalled at the lowest figure slightly more than $153,000 (on ledger) and the highest $196,000 (Hood & Strong 2nd

report), and it consisted of hundreds of items of raw material, material in process, and completed products. Likewise, apparently appellees would charge appellant with a detailed knowledge of his books when he did not do the bookkeeping, and with all entries in his records, when he made none of the entries.

More than human capacity should not be attributed to appellant. He had to rely on others, and particularly on accountants.

Appellees criticize the change of dates of inventory stock cards, which Taylor testified were made by him, but could not explain when first on the stand (V. III, pp. 1463-4), and whereby appellees claim duplication occurred. We have discussed the matter of duplication and changes in stock cards, supra, this brief, page 55-57.

There is absolutely no basis on which to claim Taylor made any wrongful entries, and there is not even a suggestion in the evidence that appellant ever knew anything about the confusion in these cards, or had anything to do with it.

(b) Claimed wrongful acts of employees.

As has been shown before any over-grading and over-pricing was immaterial and not tending to injure appellees, supra, this brief, pages 81-83.

However, there is absolutely nothing to indicate that any misgrading of merchandise in the Radford inventory was attributable to anything except mistake. It may have been the mistake of Radford, or it may have been the mistake of Kraus. In either case it was not caused by appellant.

Taylor priced the items of merchandise placed before him without thought whether they were actually there or not. In this matter, we are beginning to suspect that there was a "nigger in the woodpile," and that possibly Radford planted this misgrading in an effort to entrap appellant. We are certain that counsel for appellees was aware of the error in grading some of the merchandise when he cross-examined Gus Kraus (V. II, pp. 794-5), the man who assisted Radford in the grading, and we are likewise certain from reading the same testimony that Mr. Kraus was absolutely unaware of the fact that any error had been committed. Radford was Smith's man. Any misgrading might have been a clever idea of Mr. Smith.

Appellees also states that damage was claimed on merchandise that was not damaged. The reply to this is that Sugarman testified that he believed every item in the building was damaged to some extent, either by fire, water, smoke, or otherwise.

(c) Claimed contradictions in appellant's testimony and conflict with testimony of others.

There were no false statements in appellant's testimony at the trial, but even if there had been, such statements are not cause for forfeiture, supra, this brief, pages 68-69.

The evidence does not show any false testimony or false records by any accountant or other person employed by appellant, in connection with his claims, but even if such other persons had been guilty of false testimony or false records, this would not be a cause for forfeiture of appellant's claim.

This court cannot assume that Adjuster Smith wherever he testified, was speaking gospel, and cannot assume that Radford, paid by plaintiff and ostensibly working for him, but secretly working for and receiving private instructions from Smith (V. VI, p. 2801), was cloaked in a mantle of truth.

We point out that Smith swore there was no out of sight loss, yet the court found there was an out of sight loss.

We also point out that Smith swore that nothing was said to him about an auction sale (V. V, pp. 2762-3), when his own letter signed by himself showed that the auction was considered. (V. V, pp. 2769-70.)

Everyone is subject to mistakes. We do not exclude Mr. Smith or the appellant in this case. For instance, appellant was wholly mistaken if he said a condensed report of the merchandise on Sacramento Street on October 15, 1929, was shown him, for none was made up at that time. (Dubuque brief, p. 39.) However, one was made for Sansome Street. Mr. Hyland either had an error in memory, a slip of the tongue, or possibly even the Court Reporter wrote Sacramento Street when he should have written Sansome Street.

We refrain from discussing other claimed contradictions, etc., for we believe that this court will find that matters referred to by appellees are of no consequence.

(d) As to the legal claim that any rights of appellant could be forfeited by wrongful acts of others, we have nothing to add to what has been heretofore said, supra, this brief, pages 70-73, and appellant's brief, pages 58-59.

Equity abhors a forfeiture against a person for his own wrongful acts, and certainly will not countenance the forfeiture of a person's rights for the wrongful acts of another.

Pages 48-60. The question of the appraisal which failed has been discussed in this brief, supra, pages 9-30, and in appellant's brief, pages 67-76, and we ask the court to please refer thereto. The only two cases cited are two old California cases which are not authorities under the terms of the policies here involved.

Pages 60-62. We believe that where an insurance company deals with an insured for months as though no forfeiture had occurred, carries on negotiations, claims no forfeiture, and in the meantime the insured is caused a loss of thousands of dollars by expenses incurred and a falling market, which could have been saved in part if liability had been denied and the claimed forfeiture asserted, the insurance company will be deemed to have waived the claimed forfeiture which is asserted for the first time by an answer filed to an action.

The Supreme Court of Idaho has held that a claimed forfeiture for false swearing is waived where it is not asserted prior to answer.

> *Young v. California Ins. Co.*, 46 P. (2) 718, 722, (Idaho, 1936).

The question of false swearing by a pleading or by testimony has been considered in this brief, supra, pages 62-68, to which we ask the court to refer.

Pages 63-70. We are in accord with the statement of the appellees in reference to policy coverage.

D. REPLY TO BRIEF OF APPELLEE, NATIONAL LIBERTY INSURANCE CO.

We believe that every point made in the brief of appellee, National Liberty Insurance Co., has been discussed.

To go through it in detail and reply thereto would unduly prolong this brief and increase the burden of the court. We, therefore, refrain from replying to it separately.

CONCLUSION.

We have endeavored to place before this court the salient points of this case. We believe a consideration of the law and facts requires a reversal, and therefore pray that the court reverse the judgment of the District Court.

Dated, San Francisco,
May 11, 1936.

Respectfully submitted,
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No. 7937

In the United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company, *Appellant*,

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation), *Appellees.*

CLOSING BRIEF FOR APPELLEES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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Appellees.

CLOSING BRIEF FOR APPELLEES.

INTRODUCTION.

We were rather surprised when we read appellant's original brief. The net result, after reading the last, is a feeling of astonishment, not only that an appeal should have been taken, but also that, with so many attorneys apparently interested, so much could have been printed with so little to assist an appellate court. The most that can be said is that they have presented for consideration everything that could be argued to a jury in an attempt to win its sympathy. There is certainly nothing for the consideration of a court listening to an appeal in an equity case.

We find counsel attempting to testify, at this late date, to their idea of appellant's character. (Br. p. 4.) Where argument fails, we find that counsel for appellees are "contemptible", because they foiled appellant in his scheme to defraud. We find the time worn "argument", employed before a jury, of attacking insurance companies, their tactics and motives.

We believe that everything which has been raised in this reply brief has been fully covered, in as concise a manner as possible, in the briefs filed by the various appellees. We hesitate between this feeling and a desire to be of any possible assistance to this court. We do not like to give the impression that we consider there is anything in this brief which merits further reply, and yet we are reluctant to pass over some of the glaring misstatements and the erroneous theories of counsel. We are in a quandary as to whether or not any further briefs in this matter will add sufficiently to what has already been said to offset the additional labor entailed in reading even a few pages.

While we considered it advisable to file separate briefs originally, all of the appellees prefer to join in this reply, to save the court from possible reiteration and the necessity of devoting too much time to reading our arguments. Our original briefs were filed separately, not only to give the court the advantage of any possible difference of approach to the problem, but also because there was some conflict of interest in respect to technical defenses raised under the terms of the various policies. There has never been any difference among the appellees as to the funda-

mental issues of fraud and false swearing on the part of appellant.

As we have pointed out, in reference to the various claims of error urged by appellant, the best that can be said in his favor is that there is some conflict in the evidence. Any apparent conflict is created, either by the testimony of parties employed and paid by appellant or by the rebuttal testimony of appellant and his too willing employees and supporters, Miss Mitchell and Taylor. Where there is an actual conflict, it has been resolved against appellant by the Chancellor. The decisions are uniformly against appellant's effort to set aside this decision, and this court is so familiar with these authorities that we shall quote from only two. The first of these decisions is the latest expression of a Circuit Court of Appeals, the second is a recent expression of the rule by this court:

> " 'It has long been established by this and other federal courts that the findings of a chancellor on conflicting testimony are presumptively correct, and will not be overthrown, unless it is clear that some serious mistake has been made in consideration of the evidence. Tilghman v. Proctor, 125 U. S. 136, 149, 8 S. Ct. 894, 31 L. Ed. 664; Karn v. Andresen, 60 F. (2d) 427, 429 (C. C. A. 8); Central Republic Bank & Trust Co. v. Caldwell, 58 F. (2d) 721, 734 (C. C. A. 8; Coats v. Barton, 25 F. (2d) 813, 815 (C. C. A. 8).' Norwich Union Indemnity Co. v. Simonds (C. C. A. 8), 65 F. (2d) 134, 135; Klaber v. Lakenan (C. C. A. 8), 64 F. (2d) 86, 90 A. L. R. 783; Woods-Faulkner & Co. v. Michelson (C. C. A. 8), 63 F.

(2d) 569; Conqueror Trust Co. v. Fidelity & Deposit Co. of Maryland (C. C. A. 8), 63 F. (2d) 833; Clements v. Coppin (C. C. A. 9), 61 F. (2d) 552."

Bourjois, Inc. v. Park Drug Co., 82 F. (2d) 468.

"It is well settled that the findings of the trial court, based on conflicting testimony taken in open court, will not be disturbed on appeal. John T. Porter Co. v. Java Cocoanut Oil Co. (C. C. A.), 4 F. (2d) 476 (certiorari denied, 268 U. S. 697, 45 S. Ct. 515, 69 L. Ed. 1163); Gila Water Co. v. International Finance Co. (C. C. A.), 13 F. (2d) 1; United States v. United Shoe Mach. Co., 247 U. S. 32, 41, 38 S. Ct. 473, 476, 62 L. Ed. 968, in which the Supreme Court said: 'The testimony was conflicting, it is true, and different judgments might be formed upon it, but from an examination of the record we cannot pronounce that of the trial court to be wrong. Indeed, it seems to us to be supported by the better reason. We should risk misunderstanding and error if we should attempt to pick out that which makes against it and disregard that which makes for it and judge of witnesses from their reported words as against their living presence, the advantage which the trial court had'."

Clements v. Coppin, 61 F. (2d) 552.

While we believe that this rule definitely disposes of this appeal, we shall briefly discuss some of the points raised in the reply brief.

AS TO APPELLANT'S ARGUMENT AS TO INCENDIARISM.

Counsel are either laboring under a most serious misunderstanding, or are deliberately trying to cloud the issues in the following respects:

First, this is not a criminal trial;

Second, the mere fact that there is conflicting evidence is not sufficient to justify a reversal;

Third, even granting (without conceding) that there were errors in the admission of testimony, such errors will not aid appellant in an equity appeal;

Fourth, that this action, and the defenses to it, are based solely and only on written contracts of insurance, and the violation by the insured of certain of the terms and conditions contained therein.

Counsel state:

> "It is inconceivable that appellees could believe that the insinuations made in the oral argument are sufficient to convict the appellant of incendiarism." (Br. p. 2.)

It is perhaps fortunate for appellant that it is not necessary to argue this phase of the question. We are concerned, not with the question of reasonable doubt, but rather with whether or not there is any evidence to support the findings of the Chancellor. While it is tacitly (if not openly) admitted throughout the brief—and indeed such an admission is unavoidable—that this fire was incendiary, counsel assume the perhaps unnecessary burden of trying to prove, by argument, that appellant did not set the fire. In this respect it is pointed out that the testimony (of ap-

pellant and his employee, Miss Mitchell) shows that he was not the last person in the *"factory"*, that as a matter of fact Miss Mitchell was. This limited term is used to indicate not the building where the fire occurred, but merely the upper floors. It is pointed out that Miss Mitchell went upstairs and locked all the windows, while appellant remained on the first floor. It will be remembered that after this was done, they locked the doors and left together. It is pointed out that kerosene was habitually kept in this building—but there is no mention of the fact that it was kept *in a tank, in the basement.* (Tr. Vol. II, p. 566.) On the night of the fire we find it on all floors, including the first (where it was used so freely that it leaked through onto merchandise in the basement), where one of the fires was started. We find it on all the upper floors—in drums which have had spikes driven into them, to permit the free flow of the liquid, in pans, on the stairs and floors, and on the merchandise. (See —"As to the Nature of the Fire", brief of Western Insurance Company, pp. 9-13.) But the doors and windows are still in the condition in which they were left by appellant and Miss Mitchell—*locked.*

It is stated that appellant would have lost and could not have profited by a fire. This statement is merely one of counsel, who apparently have been unable to answer our showing that as a matter of fact appellant would have made a profit of at least $250,000 had this fire totally destroyed this building and its contents. (See—"As to the Insurance Carried by Appellant"—brief of Western Insurance Company, pp. 7-8.)

It is stated that appellant had a prosperous business and that he would have been crazy to have a fire. True, the figures that are quoted look most imposing, but we find that appellant had considerable money tied up in stock and machinery, and that there had been additional merchandise ordered months before, on *genuine* contracts. We find that the market was falling, the only definite percentage being 16% from October, 1929, until April, 1930. This decrease was on merchandise which had already sustained a substantial drop in price. *We find that before the fire he was selling finished lined bags for $30 a thousand less than his claimed cost for the same bags, unfinished and unlined.* (Tr. Vol. III, p. 1628.) He was also contemplating selling this business, and did so after the fire. Under the circumstances it would not appear so crazy to sell the stock and machinery to the insurance companies and in addition to try for a profit of $250,000. We know that this appellant did not balk at other forms of fraud.

AS TO THE MODEL OF THE SECOND FLOOR.

Counsel say they are glad that we brought this matter up on oral argument. It is also stated:

> "We may conclude this matter by stating that appellees have not had the temerity to present this matter at all in their briefs, where its weakness would be readily apparent; but they attempted to present it only on oral argument to give the court an erroneous first impression in its consideration of this case." (Br. p. 9.)

This is a good example of the reliance which can be placed upon statements contained in the briefs or in the oral argument. We shall quote from the brief of two of the appellees:

> "We made a demonstration relative to Mr. Hyland's contention concerning the stock on the second floor. In demonstrating his contention we had an extra model of this floor eliminating all machinery and anything else that would necessitate a deduction from the amount of floor space. We placed 150 bales on this second floor. These 150 bales more than covered the entire area, including that which we know was occupied by machines.
> * * *
>
> Perhaps an even better illustration would be in line with our Exhibit JJJ. This was the exhibit representing the second floor in accordance with Mr. Hyland's testimony as to its contents. While we do not know whether or not the models representing merchandise are still in position in this model of the second floor, we have in evidence photographs showing the result of attempting to place this merchandise on that floor. An examination of these photographs will show the court that it not only blocked all doors and windows, covered all space occupied by machinery, but it projected above the height of the walls. 2000 bales of burlap would have filled two floors to the same extent after removing all machinery and the stock which was later found in the building and inventoried. These illustrations will probably give the court a better idea of the meaning of this claim relative to debris." (Appellee's Br. pp. 84-85.)

Appellant naturally did not include these exhibits in those which he desired to present to this court, but we insisted on bringing them up.

Counsel refer to, quote a portion of, and attempt to explain a portion of the testimony of appellant because of which this exhibit was made. We shall quote it in full:

> "On Monday, June 21, 1930, at the office of McLaren, Goode & Co., in this city, at an arbitration proceeding on Use and Occupancy insurance, the following is a correct reading of my testimony as reported in Volume 2, page 231, of the transcript in that proceeding:
>
> 'Q. You also had material on the other floors, did you not?
>
> A. Now, we will come to the second floor. We had probably a half million bags piled in the north end of that building, all loose, ready for turning, and we had probably two or three hundred thousand yards of baled burlap which had not been opened, and we had probably 100,000 to 150,000 yards of burlap and cotton sheeting—I will change that statement, if I may; we had 200,000 to 300,000 yards of burlap and cotton sheeting which had been opened, the ends of the bolts sewed and ready to go through the sewing machine, all on that floor, and we also had probably twenty rolls of burlap which had been rolled and ready to be processed through the printing houses. That floor was quite well filled with merchandise.' "
>
> (Rep. Tr. Vol. I, p. 488.)

This court has seen the model and the photographs which show the conditions which would have existed, if appellant's testimony could be believed.

Even if we had not discussed this exhibit in our briefs or on oral argument, it is discussed in the opinion of the trial court:

"To contradict this testimony, plaintiff was confronted with his testimony at the U. & O. hearing, which was an arbitration proceeding involving other policies on which there had been a loss due to the same fire. He had there testified with some particularity that prior to the fire the second floor was filled with merchandise and in general described the quantity and type. In the course of his cross-examination he in effect adopted the testimony given at that hearing."

(Rep. Tr. Vol. I, p. 194.)

"The quantities of merchandise which plaintiff testified were on the second floor of the factory at the U. & O. hearing were greatly exaggerated. Defendants have prepared an exhibit to demonstrate the physical impossibility of the truth of this testimony. It would fill the floor with stock to the height of the ceiling and above, leaving no room for aisles and the machinery on the floor and for the employees to move about at their work. This is not such an overvaluation as might result from an honest mistake. Plaintiff as an expert in the burlap business knew the space which quantities of burlap occupy and also knew the capacity of his own factory. Counsel for plaintiff argues that the U. & O. testimony is not a definite statement but is merely an approximation of the quantities. Unless one is testifying from a computation all estimates of quantity are but approximations, but the one in question is so far removed from the possible contents that it is incredible that a man in plaintiff's position should have offered it in good faith."

(Rep. Tr. Vol. I, pp. 195, 196.)

The trial judge *heard* this testimony and *observed* appellant while he was being examined. Yet counsel, who did not have this opportunity, now try to strain, distort and explain this testimony. It has taken over four years after the trial to work out this explanation. It has taken that period of time, and the death of the judge, to attack the attitude of that judge and his alleged bias against appellant. We all knew that judge, his tolerance and his "reluctance" to find any man guilty of wilful and deliberate fraud, false swearing and perjury. And yet, in their desperation and desire to procure some money for such a man, they do not hesitate to attack that judge. We say that no man could have heard the testimony and observed the witnesses on that trial without arriving at the same conclusion.

AS TO DEBRIS.

At the trial it was insisted that there were 100 tons of this remains of merchandise. This was a little too much for present counsel, so in the opening brief they reduce this to 70 to 80 tons. We treated this at length in the briefs of Millers National and Western Insurance Companies under the heading "As to Appellant's Evidence as to the Amount of Loss or Damage". (pp. 82-85.)

Counsel realize the absurdity of their claims in regard to this item and the question of merchandise "obliterated". They cannot answer our figures showing this. Therefore they state our treatment of this subject is ridiculous, *as they do not claim it was* ALL

merchandise. This and their "contemptible" arguments remind us of the small boy, whose retort is "you're another".

What portion of this alleged 70 or 80 or 100 tons do they claim represents merchandise "obliterated", "totally destroyed" or "burned out of sight"? What type of merchandise did it represent?

We desire this court to realize that throughout the adjustment and the trial, and in our arguments and briefs, we challenged proof, *or argument,* showing what appellant claims this merchandise was. There has never been one word to explain this—except a claim of $15,713.12 in the proofs of loss, later boosted to $46,139.46, supposedly based on the figures of Hood & Strong.

These accountants obligingly tried to explain it by preparing a "yardage and poundage" report. (Exhibit 30, Tr. p. 288.) In this they arrive at the astonishing result *that appellant should have had* 494,000 yards of material (of a value of $39,638.02) *which he admittedly never had.* This material and this value (neither of which existed) were, and must be, included in order to arrive at the value of the stock claimed by appellant. This material is set up as 37/10 burlap, and yet the physical inventory taken at Sacramento Street on September 30, 1929, shows that *there was no burlap of this grade at the plant.* (Exhibit 98, Vol. III, p. 1397.) The uncontradicted testimony of Rickards shows that no such material was received subsequent to September 30. (Vol. III, p. 1219.) As a matter of fact, the only material of this kind consisted of twenty-five

bales at Sansome Street, and it was still there after the fire. (Exhibit 82, Vol. III, p. 1302 and Exhibit I, Vol. III, p. 1355.)

In their desperation counsel grasp at a straw and claim that the trial court found there was merchandise burned out of sight. They base this on:

> "I believe that some of the stock was burned out of sight but that the amount was small. *If it were necessary to determine the amount of the out of sight loss, I should find that it was* the difference between the perpetual inventory kept by plaintiff as of the date of the fire and the merchandise removed after the fire and counted by Radford, *or approximately the sum of $2,000.*
> * * * * * * *
>
> The strongest evidence introduced in behalf of plaintiff's contention that great quantities of stock were obliterated, aside from the testimony of the accountants, was the testimony as to the debris. As to the quantity and character of the debris there is serious conflict of testimony. In the light of the evidence which I have just discussed it is incredible that the debris consisted to any large extent of ash or stock burned beyond recognition."
>
> (Rep. Tr. Vol. I, p. 185.)

> "Not only does the proof show negatively that there was no substantial quantity of merchandise obliterated by the fire, but it shows affirmatively that the amounts claimed were fraudulently built up."
>
> (Rep. Tr. Vol. I, p. 186.)

> "As further evidence that there was little or no merchandise burned out of sight, the count of the

bags in process of manufacture is important. The records of the company show 190,571 bags in process on the night of the fire. Radford's count showed 189,392 identifiable after the fire, a loss of less than 1%."

(Rep. Tr. Vol. I, p. 187.)

Isn't this a pitiful showing on which to expect this court to reverse this case and find that there was $46,-139.46 worth of merchandise totally destroyed? Yet on such argument, with no testimony to support it, counsel ask this court to discredit the findings of a judge who saw the witnesses, the building where the fire occurred, the machinery involved in the fire, and heard all the testimony. This is the net result of four years of effort since the trial. As against this we have the positive testimony of witnesses, as shown in our earlier briefs under this heading.

AS TO DAMAGE.

This is fully discussed by us in the briefs of Millers National and Western Insurance Companies under the heading "As to the Evidence of Actual Damage to the Merchandise". (pp. 102-109.) No evidence was introduced on the trial by appellant, except the reports of accountants, purporting to show what *should* have been in the building. We introduced positive, not speculative evidence as counsel contend, through disinterested witnesses, that not over 25% of the merchandise was damaged. We also introduced positive evidence that the amount of damage was actually about $10,000.

There is no attempt to answer this except to refer to the "opinion" of Sugarman as to the percentage of damage. It will be remembered that this party was employed by appellant, that he was called as a witness and gave no testimony which would support such an opinion. It will also be remembered that his compensation was to be based on a percentage of any amount recovered, and that it was to his advantage to endeavor to claim and recover for damage which did not exist.

> "I had a sliding scale agreement with Mr. Hyland as to my compensation for handling this loss. That varied from 3 to 6 per cent. Well, I would not say definitely as to whether that was to be left to Mr. Hyland to determine, the amount he was to pay me. There was a kind of an understanding that it would be determined by the amount of work involved, that we would decide it between us. No, sir, there was not any agreement that I was not to be paid in the event of litigation. I am positive of that."
>
> (Rep. Tr. Vol. II, p. 1004.)

> "Answering your question 'Was the percentage of your compensation to be determined in any way by the amount of recovery from the companies?' at the time we discussed that we had no idea of a lawsuit. If I recovered a larger amount—not referring now to litigation—my percentage would be larger. Answering your question 'So it was to your advantage to boost the amount of loss?' it would have reacted to my advantage."
>
> (Rep. Tr. Vol. II, p. 1008.)

In the briefs of Western and Millers National Insurance Companies (pp. 76-88), we have discussed at

length appellant's evidence as to the amount of loss or damage. In the same briefs (on pp. 102-108), we have shown the evidence of the actual damage to the merchandise. Counsel has attempted to answer this by stating that plaintiff "believed material was burned up in the fire" (Br. p. 81), and that the court must have refused to believe the witnesses for the insurance companies because the court found that there was out of sight loss. They attempt to show that the actual damage sustained was determined by the auction sale. (Br. p. 84.) We have discussed the question of this auction sale at length in the briefs of Western and Millers National Insurance Companies. (pp. 134-139.)

It is interesting to note that during the trial there was no attempt to show the court what merchandise was damaged or destroyed, except Mr. Sugarman's "guess" (as counsel label it) as to the percentage of damage. There is nothing in appellant's opening brief, and, although we have challenged their argument, *there is not a single word in the reply brief which would enable this court to determine what, if any, merchandise was "damaged", "obliterated" or "burned out of sight".*

AS TO THE RADFORD GRADING.

The arguments of counsel in this respect show how desperate they consider their case, and how versatile they are in changing their position when they cannot answer our arguments. In their opening brief they made a statement which was one of the few with which we could concur:

"Radford took the inventory of the salvaged merchandise. (Vol. V, pp. 2503-2504.) After the merchandise had been piled in the building he was unable to go ahead and make an inventory and state the correct grade of burlap, he was not an expert in burlap. (Vol. V, p. 2525.) He was given the assistance of a man named Gus Kraus; they went straight through, and Mr. Kraus would state the grade and count the number of bolts and call the total number of yards in each bolt to him, and he would record it. (Vol. V, p. 2525.) He demanded prices on the inventoried merchandise from Mr. Taylor. (Vol. V, p. 2528.) *He took the word of Mr. Kraus as to the amount and grade of each lot of burlap.* (Vol. V, pp. 2588, 2591.) (Appellant's Br. p. 84.)"

(Appellee's Br. pp. 91-92.)

In order to show how much reliance the court can place upon statements made by counsel for appellant, we quote from their reply brief, pages 81 and 98:

"Pages 88-102. Any over-grading or over-pricing of merchandise on the Radford inventory was to the benefit of appellees and could not, even if knowingly done, constitute false swearing. (There is nothing in the evidence to indicate that any over-grading was other than merely a mistake, perhaps Radford's the employee of appellees; or that any over-pricing was other than by mistake or in accordance with an understanding between Sugarman, appellant's adjuster, and Smith, adjuster for some of appellees.)"

"In this matter, we are beginning to suspect that there was a 'nigger in the woodpile', and that possibly Radford planted this misgrading in an effort to entrap appellant. We are certain that

> counsel for appellees was aware of the error in grading some of the merchandise when he cross-examined Gus Kraus (Vol. II, pp. 794-795), the man who assisted Radford in the grading, and we are likewise certain from reading the same testimony that Mr. Kraus was absolutely unaware of the fact that any error had been committed. Radford was Smith's man. *Any misgrading might have been a clever idea of Mr. Smith.*"

It will be noted that such statements and insinuations are not supported by one word of evidence. We covered this matter very thoroughly in the briefs of the Western and Millers National Insurance Companies. (pp. 88-102.) In fact, they were so thoroughly covered that counsel has been absolutely unable to answer the testimony or our argument except by these statements.

In addition they have adopted the absurd statement of Sugarman in an attempt to show that by fraudulently raising grades and prices, and attempting to collect a larger amount, they have actually benefited the insurance companies. On pages 109 to 122 we have discussed the question of the pricing of this inventory. Counsel again have not been able to meet either the testimony or the argument and content themselves with referring again to Sugarman's argument that this could not be harmful to appellees and that there is no evidence to show that the increase in price and grade was intentional or fraudulent. This is despite the fact that we have pointed out that Hyland testified that he knew the figures to be correct, that he was familiar with values, that the values on the proofs of loss rep-

resented landed costs. This is also despite the fact that Mr. Smith testified that Hyland told him that these figures were 100% right and that Smith warned him that he would vitiate his contracts of insurance by insisting upon proceeding along this line. We ask the court particularly to refer to the comparison of values set up in the tables on pages 122 and 123. (Brief of Western Insurance Co.) The trial court grasped this situation and has set it forth very clearly and briefly:

> "The fraudulent padding commenced with the pricing and grading of this inventory. Since plaintiff was claiming, as the measure of his damages on the salvaged stock, the difference between the value of this inventory and the proceeds of the auction sale, it was to his interest to have the valuation as high as possible. Radford was not a burlap man and had one of plaintiff's employees give him the grades of the stock. Taylor, who priced the inventory, admitted on cross-examination that he knew that the grades were raised and that there was no such quantity of certain high grades of burlap in the factory at the time, and that the mistake in grading added some $6,000 to the values. He said he merely priced the grades the inventory called for. Hyland and Taylor were familiar with the grades in the factory, for Hyland did the purchasing and Taylor kept the books, and the evidence shows that Radford was either deliberately misled as to grades or that the mistake was permitted to remain with full knowledge that it was there.
>
> There was a deliberate deception as to price. The inventory was priced according to the Bemis so-called large quantity price list. This was actu-

ally a retail price list for use by the Bemis Company's salesmen. Plaintiff was not entitled to recover the retail price of the damaged stock. He was entitled to recover its replacement cost as of the time of the fire which he, as a large purchaser could procure. Not only did plaintiff use the retail price but he attempted to suppress quotations as to price from other dealers and succeeded in suppressing them and withheld information as to his own costs. Furthermore to this retail price was added a half a cent a yard to cover cable tolls, and other expenses which might have been properly added to a landed cost but obviously not to a retail price. As a matter of fact, plaintiff first testified that the inventory had been priced at landed cost but admitted under cross-examination that this Bemis price list was used. Plaintiff's adjuster testified that the matter of replacement values was left to plaintiff who was, according to his own testimony and that of others, a shrewd buyer and knew burlap prices thoroughly. He nevertheless used a price from two to four cents a yard higher than the prices at which he could have replaced his materials."

(Rep. Tr. Vol. I, pp. 188, 189.)

AS TO DUPLICATION OF PURCHASES.

This matter was discussed at length on pages 46-76 of the briefs of the Millers National and Western Insurance Companies. The trial court found:

"Defendant has established that at least $41,-361.12 should be deducted from the values claimed because of duplications. I shall discuss two of these duplications because they illustrate the

fraudulent manipulation of records by plaintiff and also show the significance of the employment of a different firm of accounts to build up values on the basis of the Ernst & Ernst inventory. A certain numbered stock sheet was given Hood & Strong representing a purchase of burlap from H. M. Newhall & Co. for $22,737 which arrived on the 'Silver Elm' as a purchase subsequent to the Ernst & Ernst inventory. The stock sheet was originally dated in May 1929; the May was crossed out and June written in above. It was contended that this material had not been counted by Rosslow who prepared the Ernst & Ernst inventory because it was on the dock at the time. The work sheets of Rosslow show that the full value of this was taken into account and included in his total. His work sheet gives the very number of the stock sheet, mentions that it is a Newhall contract and that it is recorded but not inventoried. The other duplication which I shall discuss is of a purchase of fifty bales of burlap. This is shown by a stock sheet apparently dated June 20, 1929. However, it is also numbered and the numbers on either side show merchandise received in April. There is an erasure under the month and on inspection it shows that April has been erased and June typed over it. The explanation offered that both these lots of burlap were being held for Newhall Co. is unsupported by the Newhall records and is entirely unconvincing."

(Rep. Tr. Vol. I, pp. 191-193.)

This is one of the major items considered in the reply brief of appellant. We wish that this court would examine this argument and then read our argument in connection with these various items, having the original exhibits before them.

It will be noted that the court found, and that it is virtually admitted by appellant (in fact, it cannot be denied), that there was a duplication of $22,737.12. Counsel attempt to disprove the other items. This attempt is based on the testimony of Taylor and Miss Mitchell when called on rebuttal. The trial court had this testimony in mind when the judge stated "The explanation offered that both these lots of burlap were being held for Newhall Co. is unsupported by the Newhall Co. records and is entirely unconvincing." (Rep. Tr. Vol. I, pp. 192-193.) Here again we have an apparent, not a real, conflict which has been resolved against appellant by the trial court.

In connection with Taylor's testimony it appears that he took an actual physical inventory at the Sansome Street warehouse on October 21, 1929, and found 68,000 grain bags listed under lot 521, which was the designation for manufactured bags for the year 1928. Taylor admits this fact, and that also on the top of the third page of this inventory there appears a notation in pencil, in his own handwriting, "1928 remainder". This inventory was taken, and this notation made, immediately following the fire, in the course of Mr. Taylor's duties, and at a time when he, as an employee of appellant, was anxious to definitely and correctly establish the merchandise remaining on hand. Later, on cross-examination, he states that he was mistaken in making this entry, that, as a matter of fact, this represented bales of burlap. Later, on rebuttal, and after he had heard the testimony produced by appellees, and after he had been forced to admit changes in the records made by him, which he could

not explain, and after his attention was called to the testimony of Mr. Hart, and an explanation he had given relative to this 68,000 grain bags, Taylor, in a desperate attempt to save appellant, brought forth the explanation upon which counsel now attempt to rely, an explanation which he admitted he based only on "reasoning". Miss Mitchell, of course, attempted to corroborate him, and the court rejected the testimony of both of them.

This is the same Taylor who was acting as warehouseman and who issued warehouse certificates to cover loans, showing that these loans were secured by merchandise in the warehouse when, as a matter of fact, the records of the Hyland Bag Company kept by Taylor showed that there was no such merchandise. We shall not quote the testimony showing this, although we examined him at some length relative to some of these receipts. (Tr. pp. 1574-1578.)

This man could not give us any explanation for changes in the stock sheets made by him, but he has given us three different explanations, trying to show fifteen months later that the original entry as to this item, made in his own handwriting, was erroneous, basing this explanation purely upon reasoning. It is no wonder that the court rejected such testimony.

It is also to be noted that counsel carefully avoid any reference to Hood & Strong's "yardage and poundage" report. (Exhibit 30, Vol. I, p. 288, and as amended, Exhibit 101, Vol. III, p. 1425.) This is not to be wondered at when we realize that included in the purported value shown by Hood & Strong there is

included 494,000 yards of 37/10 burlap supposedly at Sacramento Street, of a supposed value of $39,683.02, when the records of Hyland show that as a matter of fact there was no such burlap at the plant, and that there was only 50,000 yards out of a total built up yardage of 633,968 yards at the warehouse.

AS TO THE NEWHALL "FICTITIOUS CONTRACTS".

This was rather carefully covered in briefs of Millers National and Western Insurance Companies. (pp. 123-130.) The best that can be said in appellant's favor in respect to these contracts is that there was an apparent conflict between the evidence brought out on cross-examination of Colbert and the attempted rebuttal by appellant and the ever ready and willing Miss Mitchell. The trial court resolved this conflict against appellant and stated "I believe Colbert's testimony as to this contract". (Tr. p. 200.) Counsel attempt to argue that these contracts were genuine because appellant, to protect himself, wrote a letter under date of October 22nd, referring to these fictitious contracts and incorporating a reference to ten genuine contracts. This letter was handed to Colbert and by him destroyed. It never found its way into the Newhall records. It is also interesting to note that the correspondence *from* Newhall (Exhibit 130, Vol. IV, p. 1776, Exhibit 121, Vol. IV, p. 1785) which was received, and produced, by appellant, sets forth in detail all of the genuine contracts, but the fictitious contracts do not appear.

Even the manufactured evidence of the letter written by Hyland states that they desire to retain the genuine contracts. As a matter of fact, appellant later received—and eventually paid for—the merchandise covered by the genuine contracts.

Why, if these contracts were genuine, were they not produced at the trial, where their production was constantly demanded? Why have they not been found during the more than four years which have elapsed since the trial, and why were they not produced before this court with the request that it determine that there were actually such contracts, and that they were genuine?

Under the law of this state it is presumed that where a party conceals or fails to produce evidence which is available it must be presumed that it would be detrimental to him if produced. It is also a well established rule of law that where a party fabricates or manufactures evidence, testimony produced by him must be viewed with suspicion.

> "The fabrication of testimony is always a badge of weakness in a case, and when clearly established justifies a conclusion of fraud in the entire case. Allen v. United States, 164 U. S. 492, 499, 500, 17 S. Ct. 154, 41 L. Ed. 528; McHugh v. McHugh, 186 Pa. 197, 40 A. 410, 41 L. R. A. 805, 65 Am. St. Rep. 849; Nowack v. Metropolitan St. Ry., 166 N. Y. 433, 60 N. E. 32, 54 L. R. A. 592, 82 Am. St. Rep. 691; B. & O. R. Co. v. Rambo (C. C. A.), 59 F. 75."
>
> *Gung You v. Nagle,* 34 F. (2d) 848 (C. C. A. 9).

AS TO FRAUD AND FALSE SWEARING.

We must admit that it is extremely difficult for us to follow the logic of the argument advanced in this brief. On page 78 it is stated:

> "The maxims 'He who seeks equity must do equity' and 'he who seeks equity must come with clean hands', have no application against appellant in this case."

Counsel also argue and cite cases to support the claim that perjury committed during the trial would in no way affect the right of appellant to recover. One of these cases we have been unable to find due to the fact that the citation is apparently erroneous. Of course, it is a matter of common knowledge that we can find decisions of some court on any side of any subject. Such decisions are clearly against the weight of authority and are absolutely opposed to all of the Federal decisions. In addition it is inconceivable that an equity court would permit recovery by a plaintiff admittedly guilty of perjury in an attempt to establish the amount of his claim. This entire argument of counsel is directed to the fact that the provisions of the policy refer only to the proof of loss, yet the conditions of the policies under consideration vary from those involved in the cases cited by counsel for appellant in that they provide that the entire policy shall be void "in case of *any* fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof *whether before or after a loss*". But, strange as it may seem, counsel are not content with such an argument.

Despite the fact that the provisions of the policy, which are statutory and adopted by the legislature of this state as the only form of insurance that can be written, provide that any false swearing voids the policy, counsel set forth one of the weirdest arguments which it has ever been our pleasure to read:

> "In another view of this case it may even be said that the *provision in these policies of insurance for forfeiture for fraud and false swearing have no application to proofs of loss,* but that any false swearing to be a ground of forfeiture must be in reference to some matter entering into or pertaining to the contract of insurance itself. In this regard the view is that upon the occurrence of a loss, the right of the insured becomes vested, and his rights in California cannot be forfeited for any statements thereafter pertaining to the loss. None of the higher courts of California have passed on this question, but so far as we have been able to ascertain it has not been necessary for them to do so. We do not believe there is any case in California reports where the insured has been deprived of his insurance by false swearing as to his loss.
>
> The provisions in the policies in the case at bar cover false swearing relating to the insurance or the subject thereof. *A reasonable construction is that the fraud or false swearing, though it may be done after the loss, must concern the insurance or the insured* PROPERTY BEFORE THE LOSS. Nothing is said about a false claim or proof of loss."
>
> (Br. pp. 73-74.)

Naturally there are no authorities cited to support such a contention and we can rest assured that no court would enunciate such a principle, otherwise counsel, who have shown themselves to be indefatigable in their zealous search of any wording of any decision which might in any way support their contentions, would have produced any decision which had the slightest leaning toward such an argument.

As directly opposed to this argument this matter has been squarely passed upon by our District Court of Appeal in a case in which a hearing was denied by the Supreme Court. It is stated:

> "Under the provisions of the policy in the present case, wilful destruction of the property on the part of the insured, or *wilful and false statements made by him on his proof of loss with intent to defraud the insurance company, will totally avoid the policy and relieve the insurer from all liability thereunder.* (Pedrotti v. American Nat. Fire Ins. Co., 90 Cal. App. 668 (266 Pac. 376); 33 C. J. 19, sec. 667; 6 Cooley's Briefs on Insurance, p. 4938; 7 Cooley's Briefs on Insurance, p. 5858.)" (Italics ours.)
>
> *Singleton v. Hartford Fire Ins. Co.,* 105 Cal. App. 320.

We have already pointed out that the Supreme Court of the United States, and the various Circuit Courts of Appeals have uniformly reached the same decision.

It is not our intention to burden this court with a detailed discussion of the fraudulent claims set forth in the proof of loss. To very briefly point out a few

of these, it appears that the increase in the grading of the burlap from 36-8 to 36-9 and 40-8 to 40-10 added a total of $6175.06. In addition, the increase in unit cost as claimed in the proof of loss involves an increase of over $20,000 in values as compared with actual values. This is clearly set forth in the recapitulation of Defendant's Exhibit UUU. (Rep. Tr. Vol. V, p. 2723.) In this connection it will be remembered that R. V. Smith testified that the unit costs used by him were high, but even using these unit costs we find that the padding of this proof of loss by fraudulently increasing grades and prices results in an increased claim of value of this merchandise amounting to $26,365.32 out of a total claim of $73,000. In addition to this, we find that there has been a claim on each of the items enumerated in the proof of loss varying from 25 to 90%, whereas as a matter of fact the positive testimony of numerous witnesses shows that not to exceed 25% of the stock was actually damaged. We have already pointed out that there is no attempt to attack the figures of the adjuster, Smith, showing that as a matter of fact the actual loss sustained by reason of this fire amounted to only $10,000 instead of the $73,000 originally claimed by appellant.

In this connection it is sufficient to call the attention of the court to the fact that the trial court found:

> *"The false swearing in the proof of loss is, however, sufficient in itself to defeat recovery and the fraud in connection with the other claims of loss and the testimony of the plaintiff at the trial*

> *are merely cumulative in their effect.* In considering this defense it must be remembered that this is a suit in equity with its historic requirement that he who seeks equitable relief must come into court with clean hands."
>
> (Rep. Tr. Vol. I, p. 181.)

Upon the petition for rehearing which was based largely on the ground the court had failed to find that the fraud and false swearing was wilful and intentional, the court stated:

> "In the light of the argument upon the motion for new trial, there are two points in my opinion which I wish to clarify. * * * Second, in order to avoid any possible misunderstanding, I find that plaintiff was guilty of wilful and intentional fraud and false swearing in making his proofs of loss."
>
> (Rep. Tr. Vol. I, p. 232.)

Appellant cites the case of *Young v. California Ins. Co.,* 46 Pac. (2d) 718 (App. Reply Br. pp. 76-77), to the effect that the companies waived fraud and false swearing in the proofs of loss because they did not then object to it. It is an inherent quality of fraud that the parties on whom it is being practiced do not know about it, and if they do not know the fraud it is obvious that they cannot object to it. This has always been recognized in all branches of law. For instance, the statute of limitations does not run against fraud until it is discovered. The *Young* case cited by appellant is therefore not sound law generally, but it especially is inapplicable in Cali-

fornia because it is based upon a different policy than the California standard form. In the California standard form policy there is the following provision:

> "Nonwaiver by appraisal or examination. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assent to the amount of the loss or damage or by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for."
>
> (Rep. Tr. Vol. I, pp. 313, 314.)

Not only does the *Young* case admit that the court is "not unmindful of the fact that there are respectable authorities holding" to the contrary of that opinion, but it is admitted in that opinion that there is a particular exception under two instances as follows:

> "In order to constitute a waiver in such cases, however, it must appear that the company had knowledge of such defenses at the time of requiring the additional proof. And the parties may validly contract that a demand for proofs or for additional proofs shall not effect a waiver and, where it is so provided, calling for additional proofs does not waive a defense of delay or misrepresentation."

This latter specific provision is in the California standard form policy.

The same statement is found in 7 *Couch Cyc. of Insurance Law,* Sec. 1596, p. 1597.

Appellant further cites the cases of *Goldberg v. Provident Washington Ins. Co.,* 87 S. E. 1077-1079 (Ga.); *Dietz v. Providence Washington Ins. Co.,* 11

S. E. 50, 58; *Third Natl. Bank v. Yorkshire Ins. Co.*, 268 S. W. 445, 449, as authority to the effect that a plaintiff does not forfeit his right to recover under a policy for fraud and false swearing after the loss. These cases are isolated cases and are directly contrary to the rule established in the federal courts. In addition to the authorities heretofore cited in our briefs, and also in the opinion of the trial court, we refer the court to 26 *C. J.*, page 382, for the general rule upon the subject as follows:

> "There is usually a provision in policies of fire insurance that any fraud or false swearing by insured relating to the loss, or in the proofs of loss, will forfeit any right of recovery under the policy. Such a provision is valid and enforceable. (Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 3 S. Ct. 507, 28 L. Ed. 76; Perry v. London Assur. Corp., 167 Fed. 902, 93 C. C. A. 302; Weide v. Germania Ins. Co., 29 F. Cas. No. 17,358, 1 Dill. 441; Huchberger v. Merchants' F. Ins. Co., 12 F. Cas. No. 6,822, 4 Biss. 265; Geib v. International Ins. Co., 10 F. Cas. No. 5,298, 1 Dill. 443), and in order to defend on this ground the insurer is not required to tender back to insured the premium which he has paid. (American Ins. Co. v. Paggett (Ind. A.), 128 N. E. 468.) Accordingly a fraudulent overvaluation in the proofs or statements of loss will defeat recovery under the policy (Geib v. International Ins. Co., 10 F. Cas. No. 5,298, 1 Dill. 433; Howell v. Hartford F. Ins. Co., 12 F. Cas. No. 5,780; Huchberger v. Home F. Ins. Co., 12 F. Cas. No. 6,821, 5 Biss. 106; Sibley v. St. Paul F. & M. Ins. Co., 22 F. Cas. No. 12,830, 9 Biss. 31)."

The claim of appellant that he is free to make use of the processes of the court to file a false and fraudulent claim, and to ask the intervention of equity on his behalf, while he is attempting to deceive the court with false and perjured testimony, is so utterly ridiculous as hardly to call for any answer. The State of California is just as much interested in fraud committed in preparing the proofs as it is in the preparation of the contract, and it is just as much concerned with fraud or false swearing as the basis of a suit filed under the policy—in fact, more so—as it is if such was made in the proof of loss. The matter is well summed up in the case of

Mazzella v. Hanover Fire Ins. Co., 174 S. E. 521,

where the plaintiff contended that he could not be defeated in his action for a false and fraudulent claim in court because the claim as finally proved was more than the face of the policy, but the court said:

> "This reasoning will not do. The excessive figure was obviously intended for its effect in recovering the amount of the policy first by negotiation with the company, and failing in that, by jury trial. We cannot avoid the conclusion that this claim was intentionally excessive and that as such it voids the policy."

We specially call the *Mazzella* case to the attention of this court because its facts almost exactly parallel the facts of this case. The fire was a set fire, and while Mazzella proved that he was not present at the time the fire started but was visiting a sister in another town, the court makes this statement:

> "The proof does not connect Mazzella with the origin of the policy in a manner sufficient to serve the defendants beyond furnishing a strong background for the charge of false swearing."

For the same reason, like facts were shown and admitted into the record by the trial court in the instant case.

As said by the United States Supreme Court in *Claflin v. Commonwealth Ins. Co.,* 110 U. S. 81, 28 L. Ed. 76,

where the claimant testified falsely *at the trial:*

> "A false answer as to any matter of fact material to the inquiry knowingly and wilfully made with intent to deceive the insurer would be fraudulent. If it accomplished this result, it would be a fraud effected; if it failed, it would be a fraud attempted. * * * No one can be permitted to say in respect to his own statements upon a material matter, that he did not expect to be believed. * * * False statements wilfully made under oath intended to conceal the truth on these points constitute an attempted fraud by false swearing which was a breach of the conditions of the policy and constituted a bar to the recovery of the insurance."

This vigorous statement by our Supreme Court is all the answer that is needed to the claim of plaintiff that he is "at liberty" to bring a false and fraudulent claim into court and to swear falsely in support of it without voiding his policy.

THE FAILURE TO SECURE AN APPRAISAL WAS ATTRIBUTABLE TO THE INSURED HYLAND AND TO HIS APPRAISER, COLBERT, AND THEREFORE APPELLANT COULD NOT MAINTAIN A SUIT ON THE POLICY.

The legislature has established by law the California standard form policy. In this form it adopted as the public policy of the State of California the principle of arbitration by an appraisal of insurance losses. It is provided in the California standard form policy that the insured must on demand of the insurer appoint a competent and disinterested appraiser and that the appraisers of the two parties shall then choose a competent and disinterested umpire, and that the three so selected shall appraise the loss.

Under the provisions of the policy the insured is given the right to bring a suit only when the failure of the appraisal is not attributable either to him or to his appraiser. Unless he has fully complied with these provisions of the policy, he may not bring a suit on the policy.

The principle of arbitration is now thoroughly engrafted as part of the law of California, not only in insurance matters but by a general arbitration statute.

1927 Laws of California, p. 404;
Sec. 1280, Code of Civil Procedure, et seq.

It was alleged as a defense by the primary insurance companies that "the appraisement was not had due to the acts of the plaintiff and the appraiser appointed by him". That much was known at the time the trial started. The attitude of Hyland's appraiser, Colbert, was such that there was no doubt in the mind of the appraiser appointed by the company that he

would not agree to any competent disinterested umpire, but the reason for such attitude was not at that time known. But during the trial Colbert broke down under cross-examination and confessed himself to be entirely under the control of Hyland, confessed that he was receiving secret commissions from Hyland on sales of goods to Hyland by Newhall, Colbert's employer, and confessed that subsequent to the fire, at the bidding of Hyland, he had aided Hyland in drawing up six fictitious contracts to enable Hyland to show an exaggerated and fictitious loss in his use and occupancy insurance arbitration, that within thirty-six hours of the fire Colbert had asked Logie, a foremost authority on burlap prices on the Pacific Coast, not to give out any prices on burlap in connection with the Hyland loss.

Finally, Colbert confessed that during the course of this trial he had again aided Hyland in redrafting the fictitious contracts, changing only the price for use in this trial.

And yet appellant argues in his reply brief that Colbert was a "disinterested" appraiser. Realizing the weakness of his argument he argues that if not actually disinterested, that anyway he was entitled to have an appraiser who was in a measure biased and who should show an interest. He then argues that he is not bound by the acts of such an appraiser. He cites in support of his contentions that he is not bound by the failure of the appraisement the case of *Norwich Union Fire Ins. Society v. Cohn,* 68 F. (2d) 42, C. C. A. 10th. It is there said:

> "There can no longer be any doubt as to the validity of the appraisal clause in fire insurance policies. The insured, upon seasonable demand, must comply therewith or there can be no recovery. Hamilton v. Liverpool & L. & G. Ins. Co., 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419; Aetna Ins. Co. v. Murray (C. C. A. 10), 66 F. (2d) 289; St. Paul Fire & Marine Ins. Co. v. Eldracher (C. C. A. 8), 33 F. (2d) 675; Phoenix Ins. Co. v. Everfresh Food Co. (C. C. A. 8), 294 F. 51."

The court then decided in that case that having *"in good faith"* entered into one appraisal and there having been a failure of an appraisement award *"without his fault"*, he was not prevented from bringing suit and it was not necessary that he enter into a second appraisement. With this latter contention we are in entire agreement. There was no second agreement asked in the instant case and none could legally be asked because if an insured in good faith appoints an appraiser and the appraisement fails for reasons entirely outside of the control of the insured, he is not obligated to enter into a second one, and the policy provides that he may bring suit in such event.

But such were not the facts in this case. It is specifically found by the trial court (Rep. Tr. p. 197, Vol. I):

> "The vice in appointing Colbert lay in the fact that his connection with plaintiff was secret and tainted with fraud."

Appellant never at any time "in good faith" appointed an appraiser and attempted to have an appraisal. As said in the *Norwich Union* case, supra:

> "Upon demand the insured must *in good faith* comply therewith; he must name a competent and disinterested appraiser and must not directly *or indirectly* prevent the making of an award."

When appellee's appraiser, Maris, accepted Colbert's nomination of Logie as an umpire, Colbert discovered that Logie did not believe there could be any out of sight loss from such a small fire in view of the fact that burlap will not burn out of sight in that kind of a fire. Logie testified:

> "Mr. Colbert replied that he was required to 'consult' in regard to that and later on in the day he phoned and told me that I had not better serve." (Tr. Vol. IV, p. 2162.)

Whom would he "consult" except Hyland, particularly in view of their close fraudulent connections?

Appellant quotes the case of *Norwich Union Fire Ins. Society v. Cohn,* supra, to the effect that the fault of an appraiser is not the fault of the party appointing him, but that case used such phraseology only in connection with an appraisement entered into "in good faith" by the insured. It did not refer to an appraisement such as this that was entered into in fraud.

Appellant has not cited one case that upholds his contention that an insured need only defeat an appraisal in order to be allowed to bring his suit. He so contends on page 30 of his brief when he states:

> "That without regard to appraisement, whether completed or not, the loss shall be payable in 90 days after the receipt of the preliminary proofs of loss."

We challenge appellant to cite any authority construing a policy such as is the subject of the litigation in this case where an insured acted in bad faith and did not appoint a competent and disinterested appraiser. Such a holding would nullify the arbitration clause in the policy. Any insured could prevent the appraisement by the mere device of appointing and controlling a servile or crooked appraiser.

For the first time the appellant, with new counsel, is raising the issue that Maris was not a competent and disinterested appraiser. Such issue was never raised during the trial and the case was tried only to determine whether Colbert was a competent and disinterested appraiser, he being the only appraiser as to whom such issue was raised. Neither in his pleadings, at the trial, nor on motion for new trial did appellant ever claim that Mr. Maris was not a competent and disinterested appraiser. Appellant now claims that there was no evidence on the disinterestedness of Mr. Maris. This is not correct. The evidence is to this effect, that Maris was an independent appraiser and adjuster, maintaining offices in San Francisco. He was independently chosen by six primary companies to represent them as an appraiser in this case. There is no evidence that he ever represented anyone of them in any case before, either as an appraiser or as an adjuster. Appellant himself placed in evidence the letter of Mr. Maris to Colbert, dated June 7, 1930, which stated (Tr. Vol. III, p. 1283):

> "Being entirely disinterested, the outcome of the proposition submitted to us as appraisers is

> of no moment to me, yet it seems unfortunate that it was apparently impossible for you to consider anyone as umpire unless that one was in some way connected with or beholden to the insured, their attorneys, your good self or the firm you represent. In closing, may I express the opinion that the failure to have and complete this appraisement is not attributable to me."

Furthermore, the correspondence immediately preceding the quotation cited above indicates that Mr. Maris demonstrated his disinterestedness by nominating people whom his investigation disclosed to be entirely disconnected with any of the parties, and some of whom he didn't even know, but relied upon recommendations of others of their disinterestedness and their competency. This in itself demonstrates his disinterestedness. The evidence placed in the record by the plaintiff himself is sufficient to sustain the finding that the defendant companies appointed a competent and disinterested appraiser, even if that matter were in issue.

Plaintiff cannot raise such an issue for the first time in the appellate court, and certainly his claim that there is no evidence showing the disinterestedness of Maris is not correct. Plaintiff supplied the evidence himself.

The utter unreliability of appellant's brief is shown by the fact that on page 23 he argues that Colbert was competent and disinterested because "such competency and disinterestedness is presumed". On page 28 he states that there must be proof that the appraiser ap-

pointed by the defendants was competent and disinterested and that as no proof had been made of this "the inference is to the contrary".

Appellant admits on page 26 of his reply brief that our citations of California authorities hold that unless the insured in good faith makes an effort toward securing an appraisement when demanded by the insurer, he cannot bring an action on the policy. However, he argues, these decisions were on policies prior to the California standard form. He cites no authority holding to the contrary under the California standard form, and such argument is utterly unconvincing because if the California courts held that the provision for an appraisement was binding and a condition precedent to institution of suit in the case of contracts drawn up by the insurance company, how could such decision be any the less applicable when the policy is not drawn up by either of the parties but is enacted by the legislature and required as a part of the law and public policy of the State of California? Certainly, when using the same phraseology the legislature intended to have the same interpretation of the policy and the courts have so held.

> "After the adoption of the Standard form of policy the law of waiver and estoppel remains the same as before upon the subject."
>
> *Raulet v. Northwestern Ins. Co.*, 157 Cal. 213.

In the case of *Old Sausalito Land Co. v. Union Ins. Co.*, 66 Cal. 253, it is particularly pointed out that the policy required an adjustment "or a fair effort on the part of the assured to obtain it", or else no cause of

action arose. There is no reason for construing the standard form policy any differently.

It hardly seems possible that appellant has read the opinion of the trial court and the findings of the trial judge in connection with the Colbert transaction. Over six pages of the transcript are devoted to that portion of the trial court's findings and opinion. (Vol. I, pp. 196-203.) The argument of appellant takes the form purely of assertion and reiteration, without answering the damning evidence summed up by the court and his findings that Colbert's connection with appellant was secret and tainted with fraud, that Colbert was not disinterested, that Colbert was in the secret pay of appellant, that appellant had bribed him and that the appellant also used Colbert as a tool in his attempt to obtain an excessive award for his loss at the U. & O. hearing.

In his reply brief appellant refers to his payments to Colbert as being "gratuities". (Reply Brief p. 19.) In gratitude for what, was appellant giving gratuities to Colbert? Could it not have been for value received? But merely calling it "gratuities" does not make it any the less a bribe.

Appellant's defense of the fictitious contract is certainly unique.

Appellant claims (Reply Brief p. 10) that the question of the fictitious contracts is wholly collateral and that the weight of the evidence is that there were no fictitious contracts. These contracts were directly in point, proving the contention of the primary insurance companies that plaintiff had not appointed a disinter-

ested appraiser and had prevented the appraisement. It was evidence of a relationship of fraudulent conspiracy between Hyland and Colbert. Appellant attempts to justify his claim that these contracts were not fictitious by quoting his own letter, which he wrote as a self-serving alibi, addressed to Newhall & Co. and delivered personally to Colbert (and which Colbert tore up). He next quotes his own testimony in which he categorically denied the making of these fictitious contracts and claimed that he considered them at all times bona fide contracts.

Now, it is pertinent to remark that not only did plaintiff deny that these contracts were fictitious and assert that they were bona fide contracts, but at the same sitting he also contradicted the testimony of witness after witness concerning all of the major issues that developed at the trial. This was near the end of the trial when he took the stand in rebuttal. Beginning at page 3231, Vol. VI of the record, he categorically denied the testimony, not only of Colbert, but also the testimony of Captain Sullivan (p. 3241), the testimony of Fire Marshal Kelly (p. 3242), the testimony of R. V. Smith (p. 3261) and the testimony of Mr. Grove (p. 3279). Some of these categorical denials of the plaintiff conflicted with positive testimony given by disinterested witnesses fortified by their written memoranda made at the time of the occurrences. His contradiction of R. V. Smith was in part concerning the testimony of Mr. Smith which was based directly upon a memorandum made at the time of conversation with Hyland. This rebuttal testimony of the

plaintiff could not be believed by any fair-minded judge. He simply added perjury on perjury.

His denial of making these fictitious contracts was the most incredible of all. This court did not witness the scene in the courtroom as did the trial judge when Colbert was recalled on cross-examination and confessed in open court that he was a felon, a knave, and an ingrate. He confessed that he had subjected himself to danger of criminal prosecution in aiding Hyland in preparing these fictitious contracts for use in collecting insurance. He confessed that after thirteen years as head of the import department, during which time he had enjoyed the confidence of his employers, the H. M. Newhall & Co., that he had betrayed them and had accepted secret commissions from Hyland. He confessed that he was under the domination of Hyland and even during the course of the pending trial had aided him in remaking the fictitious contracts with a difference in price; and, finally, that he had tendered his resignation to H. M. Newhall & Co. No fair-minded judge could find other than did the trial judge in this case (Vol. I, p. 199):

> "In the face of the evidence, plaintiff's contention that these contracts were valid is incredible."

And as to the conflict between Colbert and Hyland the trial judge stated (Rep. Tr. Vol. I, p. 200):

> "I believe Colbert's testimony as to this transaction."

These contracts were not merely collateral. The trial judge admitted the evidence regarding these fictitious

contracts because they showed that "the appraiser was not only not a disinterested one, but that he was fully cooperating with plaintiff in his fraudulent scheme". (Rep. Tr. Vol. I, p. 200.)

The findings of the trial court should not be overturned where there is evidence of such startling nature to sustain them.

AS TO OTHER MISSTATEMENTS IN APPELLANT'S BRIEF.

We have already pointed out to the court a number of misstatements by counsel for appellant. In our opening brief we pointed out numerous other misstatements and attempted to excuse them on the ground that counsel had not sat through the trial and was therefore probably somewhat unfamiliar with the evidence. We cannot excuse these on the same ground. We have picked out only a few of these at random and will call them to the attention of the court.

It is stated on page 10 of the reply brief that as to the fictitious contracts "no charge was there made (that is, in the use and occupancy matter) that they were fraudulent or invalid in any respect". There is no such testimony in this case, and we believe that we have thoroughly convinced this court that these contracts were fictitious.

It is stated on pages 17 and 18 that:

> "We believe it is significant that there was no testimony introduced that Newhall & Co. did not receive material such as was called for by these alleged fictitious contracts, and likewise it is sig-

> nificant that they did not permit appellant's accountant to make a general examination of their records."

In the first place, any evidence as to what Newhall & Co. may have received certainly would not be admissible. They were among the largest dealers in burlap on the coast, and the mere fact that they may have received two or three million yards, or even larger quantities of burlap, would not in any way tend to prove or disprove the issues in this case.

As to the second portion of this statement, it can be nothing more nor less than deliberate, as it appears that the only restrictions that Mr. Newhall put on Parker was that the examination was to be made in the office of their accountants, and that they would submit any documents Parker wanted. When he conveyed this information to Mr. Schmulowitz, the latter instructed Parker to drop the matter. (Tr. Vol. VI, p. 3310.)

On pages 20 and 21 it is claimed there was nothing secret about the allowance from Hyland to Colbert. This statement is based solely on the fact that there is a record of these allowances on Hyland's books. It is further stated that it is not apparent that Newhall & Co. ever suffered in the slightest from these relations between Colbert and Hyland, although, as we have pointed out, they did directly result in the cancellation of one contract and the reselling of the same merchandise to Hyland at a considerably lower figure. (See summary of testimony, Brief of Western Ins.

Co., pp. 64-65.) What other damage may have been suffered by Newhall & Co. as the result of allowing Colbert commissions we do not know.

On page 57 it is stated that:

> "It is apparent that the suggestion of Hood & Strong's report, Plaintiff's Exhibit No. 2, arose not from appellant but from an employee of a reputable accounting firm, Mr. Parker of Lybrand, Ross Bros. & Montgomery."

It is true that Mr. Parker had at one time been an employee of that firm, but that at all of the times involved in this litigation and referred to in the trial, or in the briefs, Mr. Parker was in the employ of, and in the office of appellant. Such a statement could be made only for the purpose of attempting to convince this court that Parker was a disinterested party when he was actually an employee of Hyland.

On page 87 it is stated:

> "Smith was the head of the adjusters and whatever he did was agreeable to the others."

In appellant's opening brief it was stated in several places that Smith represented all of the appellees. When this was pointed out as a misstatement, counsel, without one word upon which to predicate such a statement, and contrary to the fact, incorporates the foregoing in the brief.

On page 89 it is stated:

> "Many serious mistakes of fact and law appear therein. As one instance of fact, we refer to the

court's statement that 'if the quantity of merchandise claimed to have been obliterated, had been in the factory at the time of the fire * * * the building * * * would have been taxed with a load beyond its capacity'. (V. I, p. 193.) Counsel now admit that this statement, argument, or finding is erroneous. (Brief of Western Insurance Co. of America, p. 186.) That such a prejudicial statement is not correct, removes the presumption of correctness from other statements in the opinion."

Such a statement could not be otherwise than deliberate. The statement of the court quoted refers to the question of the 100 tons of debris which we have demonstrated in our briefs would have filled each of the floors of the building to the same extent as the model of the second floor which appellant so bitterly attacks. This is discussed in detail on pages 82 to 85 of the brief of Western Insurance Company of America. It is true that we admit that we do not claim that merchandise of the value of $132,000 would have overtaxed the building, but immediately following this we reiterate our claim that merchandise represented by the claim of debris would have been more than the building would have held.

Again, on page 91, we have another instance.

It will be remembered that we set forth on page 190 of the brief of the Western Insurance Company, the following:

"Mr. Thornton. In addition to that I would like to point out this fact: *You will remember we*

have asked for an examination of these very carefully kept books, but so far we have been deprived of any examination.

Mr. Schmulowitz. Evidently the Court thought you were not entitled to an examination at the time you asked for it." (Rep. Tr. pp. 31-33.) (Italics ours.)

In an attempt to offset this, counsel would mislead this court by referring to a portion of the testimony of Hart, showing that when he was in the employ of other parties in the fall of 1929 and made an investigation for certain purposes in connection with use and occupancy insurance, he was not prevented from looking in the books. On this statement counsel would have this court infer that appellees, who were not in any way connected with the use and occupancy insurance, were permitted to examine plaintiff's books. As a matter of fact, such an examination was not permitted until after the trial had progressed for several weeks, and then only under very distinct and positive orders of the trial court.

We respectfully submit that this court should affirm judgment.

Dated, San Francisco,
May 22, 1936.

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No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company,

Appellant,

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation),

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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Appellees.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant hereby petitions this Honorable Court for a rehearing of the above entitled cause.

PRELIMINARY STATEMENT.

In this case, this Honorable Court is a Court of Equity. The majority opinion holds appellant cannot recover upon the insurance contracts sued upon by him because of the failure of appraisal and because in the view of the Court his claim for out of sight loss was too large. The majority opinion therefore as a Court of Equity decrees a forfeiture upon appellant of many thousands of dollars which we believe to be justly due him upon said insurance contracts, and stigmatizes appellant as having knowingly and intentionally attempted to commit a fraud.

We sincerely believe that the majority of this Honorable Court has not given adequate consideration to the difficult situation which presented itself to appellant at the time of the fire here involved; that appellant has been held to a standard of perfection and knowledge of detail in the management of his business which few, if any, men could meet in operating a large business.

That appellant was not in personal charge of his factory has never been questioned. His factory was working overtime. His accountant stated that his bookkeeping was very much behind: "with reference to the period between June 1, 1929 and October 19, 1929, the entries made in the books were not kept up to date." (V. III, p. 1301.) The accountant also testified that the material on hand was always more than his records showed "running into large figures" (V. III, p. 1365.) The testimony of two witnesses called by defendants shows definitely that no one knew

exactly what was on hand immediately following the fire. Thus witness Terkelson, for defendants, testified:

> "I kept asking, I asked Mr. Taylor on three or four occasions, I asked Mr. Hyland, and I asked Mr. Sugarman on several occasions, also if they had any idea what the valuations were, so that I could assist in the apportionment of the claim. Everyone I asked told me they didn't know. I have a hazy recollection that I was informed on Monday, Oct. 21, 1929, that the valuations might run around $130,000, but it did not come from any official source." (V. VI, p. 2970.)

Witness Smith for defendants, testified that on the day after the fire:

> "I went back to the office and I saw Mr. Taylor again, and at that time he told me—he had told me that he was the accountant for the Hyland Bag Company, or bookkeeper. I don't know just how he expressed it, but he wanted to know what work that would make for him, what his duties would be as bookkeeper, and I told him that it would be proper for him to close his books as of the date of the fire. *And I asked him if he knew what quantity of merchandise there was in there, what the value of the merchandise was, and he told me he didn't know exactly, but he thought it was less than $100,000, and between $90,000 and $100,000 I would say. I think those were his words as I recall them.*" (Italics ours.) (V. V, p. 2622.)

This same witness testified that he "did not have much confidence in any perpetual inventories." (V. V, p. 2622.) Plaintiff saw what he judged a lot of ashes after the fire (V. I, p. 471) and it appears beyond dis-

pute that a great deal of debris was removed from the building following the fire. (V. VI, pp. 3050-3060; V. II, pp. 767-8.)

Appellant at the suggestion of his adjuster took the only reasonable course, and called in expert accountants whose reputation and integrity have never been questioned and asked them to determine as accurately as possible what was in his factory at the time of the fire, and based upon their report he filed his proof of loss. No better mode of procedure can be suggested, the good faith of this procedure was not questioned and defendants' accountant testified that appellant's accountant had "fairly done their work" (V. V, p. 2391), and subsequent to presenting the proofs of loss and prior to the filing of defendants' answers in this case, there was no claim or suggestion of false swearing.

To fasten a charge of false swearing upon appellant under these circumstances, is contrary to the evidence and without sanction or parallel in the annals of the law.

Likewise upon the question of appraisement it is respectfully submitted that the majority opinion must have been predicated upon insufficient consideration of the underlying merits of the controversy favoring appellant, due doubtless to the voluminous record and the burden this Court has carried in maintaining a current docket.

Appraisal failed because no umpire was agreed upon.

No witness, not even Colbert, whose testimony is termed "a confession", testified or suggested that ap-

pellant interfered with the attempt to choose an umpire, or tried to dictate the choice of an umpire, but on the other hand Colbert testified that he "would take no dictation from anybody, but the thing would be settled absolutely on business merits with Mr. Maris and the third party, whoever it might be." (V. III, p. 1291.)

Moreover, that Colbert, as appellant's appraiser, made a genuine effort to consummate the appraisal appears from the correspondence in the record between the two appraisers. (V. V, pp. 1265-1285.) The effort to reach an appraisal continued for a considerable time after suit might have been brought, and Colbert especially urged an appraisal rather than a sale of the merchandise. (V. III, p. 1275.) He invited Maris to suggest the name of any of the Judges of the Superior Court. (V. III, p. 1278.) But Maris didn't want a Judge of the Superior Court. (V. III, p. 1279.) One umpire (E. W. Wilson), agreeable to both parties, declined to act for personal reasons. Another suggested umpire (Mr. Logie), suggested by Colbert and belatedly accepted by Maris, would not act except upon certain stipulations. Although it is not definite in the record, apparently he had prejudged one of the disputed matters, and, if so, Colbert properly suggested the refusal to act which followed a conference with him.

Conrad v. Massasoit Ins. Co., 4 Allen (Mass.) 20, 22;
5 *C. J.* 65-6.

There is evidence in the record without any contradiction that Maris the appraiser appointed by defend-

ant, was not disinterested. (V. III, pp. 1284-5.) *If he was not disinterested, then, even if it is assumed that Colbert was not disinterested, the law places the burden of the failure upon defendants, and appellant was entitled to bring his action.* (See First Ground for Rehearing, Subdiv. 4, p. 17, infra.)

Finally, appraisal not having been made, the salvaged property was sold at auction with the consent of defendants, and dispersed among many buyers. The appraiser for defendants left the city for some weeks. (V. III, p. 1279.)

Under these circumstances this case would seem a travesty upon the name of equity for this Honorable Court to hold plaintiff cannot maintain his action by reason of failure of arbitration.

Specifically a rehearing is asked upon the grounds hereinafter stated.

FIRST GROUND FOR REHEARING.

THE COURT ERRED IN FAILING TO CONSIDER THE POINT THAT APPRAISAL WAS WAIVED BY APPELLEE COMPANIES.

While the majority opinion refers constantly to "arbitration", it should be pointed out that the policies do not provide for a general arbitration, but the clause in the policies in question is "an agreement for an appraisement and not an arbitration."

Phoenix Fire Assur. Co. v. Murray, 187 Fed. 809, 810 (CCA 3rd).

Appellant made the point both in his brief (Brief for Appellant, pp. 67, 76-78) that appraisal was waived; and in his reply brief (Appellant's Reply Brief, p. 25) that appellees waived any objection to appellant's appraiser on the ground that he was not competent or disinterested.

Though the evidence in this case fully supports both the waiver of the appraisal by the appellees, and the waiver of any objection to the appellant's appraiser on the ground that he was not competent or disinterested, the Court has entirely failed to give any consideration to these facts.

1. Appraisal was waived by appellees' consent to sale of damaged merchandise.

The damaged stock remaining after the fire was sold at public auction on April 22, 1930. Such sale, of course, made appraisal impossible. Yet, this sale was made with the consent and in conformity with the wishes of R. V. Smith, adjuster for appellees (Tr. V. I, pp. 385-6), and in fact said adjuster was a bidder, though not a purchaser at the sale. (V. I, pp. 998, 1001.) This consent to the sale of the damaged stock, being entirely inconsistent with reliance upon a claim of forfeiture for non-appraisal, most certainly waived the provision of the policy for forfeiture based upon failure of appraisal.

> "A provision for arbitration or appraisal, of course, may be waived. And either party waives the right to insist upon such provision by any action inconsistent with reliance thereon."
>
> 26 *C. J.* 429.

"That the portion of the policy contract which makes arbitration of damage a condition precedent may be waived by the company is now the uniform holding of the courts. And the courts in determining the question of waiver, hold the company to a strict compliance with the specific terms of the contract before they will so apply the condition as to work a failure to the insured of his right to sue * * * There must be, on the part of the insurer, no action which is inconsistent with the right to rigidly insist on an award as a condition precedent, else the right is waived * * *."

Harrison v. German American Fire Ins. Co., 67 Fed. 577, 582.

"The provisions of the policy requiring an appraisal in case of disagreement and the furnishing of proofs of loss, were for the benefit of the company and could be waived by it."

Western Underwriters Assn. v. Hawkins, 77 N. E. 447, 449 (Ill.).

"A provision in a policy of fire insurance providing for an appraisal, in case of disagreement as to the amount of loss, as a condition precedent to a right of action, is an enforceable and valid provision * * * but there is no doubt that provisions of this character are as susceptible of waiver as are provisions in any other sort of contract, and, if waived, they are no longer a bar to the bringing of an action upon the contract. * * *

A right of this character once waived can never be revived without the consent of the other party."

Johnstone v. Home Ins. Co., 34 S. W. (2d) 1029, 1032-3.

As a matter of law and fact, could there be any stronger evidence that the companies did make a waiver of appraisal of the loss and damage, than is shown by their consent to the sale of the damaged goods, and its dispersion among many purchasers? Since the stock was not only immediately dispersed, but it would quickly be used in a multitude of ways, it seems incontrovertible that this consent was a waiver of appraisal, and consequently a waiver of forfeiture for non-compliance with the appraisal provision in the policy

> "Where the insurer, with knowledge of a right to forfeit, sells the salvage from the fire, it thereby waives its defense."
>
> 26 *C. J.* 338.

There is no difference in principle apparent between a sale by the insurer and the insurer's consent to such a sale by the insured.

The majority opinion is erroneous in holding that there was a forfeiture by reason of non-appraisal, when such appraisal was waived.

2. Objection to competency or disinterestedness of appraiser appointed by appellant, was waived by failure to seasonably object to appraiser on this ground.

The law applicable to waiver of objection to an appraiser is stated as follows in 6 *C. J. S.* p. 187:

> "Notwithstanding the existence of facts which may influence the judgment of an arbitrator, if a party with knowledge of such facts, submits his case to the decision of such person, the objection is waived; and the same rule obtains where a

> party, who has agreed to submit to arbitration without knowledge of disqualifying facts, afterward during the progress of the hearing, obtains knowledge thereof, but nevertheless proceeds, without objection to the making of an award."

Sturges in his authoritative work entitled *"Commercial Arbitrations and Awards"*, at pp. 365-6, states the following:

> "In considering the requisite qualifications of persons to serve as members of an arbitration board, it may be well first to call attention to rules of waiver which are applicable to those cases. Most, if not all, causes to disqualify a member are held to be waived in either of the following situations: (1) Where the complaining party has promoted or acquiesced in the appointment of the member complained of with knowledge of the alleged cause of his disqualification; (2) Where the complaining party has not promptly objected to such member continuing in office after he has suspected or become informed of the alleged cause for disqualification. The pleadings and proof of the party setting up the alleged disqualification must exclude both of these possibilities."

The majority opinion lays great stress upon the disqualification of appellant's appraiser, because appellant had at various times prior to the fire paid said appraiser commissions, or given gratuities to him on transactions between appellant and the regular employer of said appraiser. Although we believe that such occasional commissions or gratuities should not be held to disqualify appellant's appraiser, yet even if it did, such disqualification must be held to have been

waived, for the record does not show that any objection was ever raised by defendants to said appraiser on this, or any other ground prior to the filing of defendants' answers. The fact of the gratuities to appellant's appraiser on occasions previous to the fire was entered in appellant's books, and the accountants for defendants were given full access to these books immediately following the fire, but said appraiser was not appointed until more than three months after the fire. (V. I, p. 411.) The appellants showed at the trial that they were fully cognizant of the payments to Colbert by demanding the particular ledger sheet where they were entered. (V. III, p. 1706.)

It is, therefore, evident that defendants must have known of such alleged disqualification at the time of the appointment, or during the efforts of the appraisers to reach agreement on an umpire, and they held back their objection for subsequent use when it would be too late for appellant to meet their objection by appointing another appraiser, well-knowing from their wide experience in their specialized insurance work, that if the appraisal failed because of any burden that could be thrown upon appellant, they might avoid payment of the loss.

In the case of *Ledlie v. Gamble,* 35 Mo. App. 355, 358, where there was an effort to set aside an award on the ground of fraudulent combination between the plaintiff and the arbitrator, the Court stated:

> "Such a case is analogous to that where a party knows of a ground for disqualification of a juror. * * * In the case of a juror in order to make such objection available after verdict, it must appear,

not only that the disqualifying fact was unknown to the objecting party before the trial, but also that it would not have been disclosed to him on proper inquiry."

"That company was under the duty to allege and prove a lack of knowledge of the things complained of, in order to escape the burden of having waived such things."

Pope Construction Co. v. State Highway Comm., 92 S. W. (2d) 974, 981.

"From these and other authorities it would seem clear that when one seeks to impeach an award he must show that he made objection as soon as he discovered the disqualifying facts."

Pearson v. Barringer, 13 S. E. 942, 943 (N. C.).

The pleadings of defendants do not in any wise suggest or allege that the defendants did not know of the claimed lack of disinterestedness of appellant's appraiser at the time of his appointment, or within ample time to object and demand the appointment of another appraiser. Hence, we believe that if there is any basis for holding that appellant's appraiser was not disinterested, defendants under their pleadings, as well as under the facts, should be held to have waived such disqualification.

The majority opinion states:

"The insurance companies would have no reason to suspect that one in such a position would be a person capable of the frauds committed with Hyland. They were not exposed until Colbert's confession of them in the trial below."

It is respectfully submitted that if by this statement it is intended to mean that the payment of commissions or gratuities received by Colbert from Hyland were not known prior to the trial, there is no foundation in the record therefor. In view of defendants' minute knowledge of appellant's books acquired immediately after the fire, the only statement made by Colbert at the trial which could possibly be claimed not to have been known to defendants at the time of the appointment of Colbert as appraiser, was his claim that certain cancelled contracts were fictitious.

In crediting the claim of fictitious contracts, the indefinite statement of Colbert made at the behest of his employer, an enemy of Hyland (V. VI, p. 3041), under threat of criminal prosecution (V. IV, p. 2126), is accepted against the overwhelming weight of other testimony, that the contracts referred to were genuine. (We ask the Court to refer to Appellant's Reply Brief, pp. 10-19.) The statement of Mr. Newhall that the records of Newhall showed that contracts bearing these numbers were with other persons than appellant, is of slight weight, since Newhall & Co. refused to permit an accountant to make a general examination of their records in reference to this matter (V. VI, p. 3310), and also in view of the fact of the Newhall enmity to Hyland above referred to, and further in view of the fact that Newhall & Co. were in the insurance business. (V. IV, p. 2126.) We believe, therefore, that the evidence shows beyond a question of doubt that there were no fictitious contracts, and moreover, as has been pointed out, even if such existed, they were wholly collateral to any issue in this case.

In view of the statement in the majority opinion above quoted, we further suggest that defendants are in this dilemma: They either knew of this claim of connection between Colbert and appellant at some prior time, and therefore waived any objection by failing to assert it, or they didn't know of Colbert's alleged lack of disinterestedness, and hence could not have intended it when preparing their answer.

For the reasons set forth herein, it should be held that any objection to appellant's appraiser was waived by failure to assert it when the facts became known, or are presumed to have become known to defendants. And if any fact was not learned until the time of the trial, then it could not be inferred that such fact was intended to be comprehended in a pleading drawn long prior thereto.

3. Any objection to appellant's appraiser on the ground that he was not disinterested was waived by failure to plead this defense.

With all due respect to the opinion of the majority filed herein, we submit that under all authorities on pleading that the answer of defendants in reference to the failure of appraisement is not sufficient to raise the question of the competency or disinterestedness of the appraiser appointed by appellant. (V. I, pp. 48-50.) Appellant objected to this answer by motion prior to trial. (V. I, pp. 149-150.)

It will be noted from the answer referred to, that defendants alleged that appellant appointed an appraiser. The language of defendants' answer was as follows:

"And the plaintiff within five days after receipt of such demand and name notified these defendants in writing of the appointment of an appraiser named by him. The appraisers so named did not agree upon the amount of loss or the sound value of the damage, and did not agree upon an umpire. The appraisement was not had due to the acts of the plaintiff and the appraiser appointed by him, and this action was commenced before compliance by the plaintiff with the provisions of each of said policies of insurance regarding the appraisement of the loss." (V. I, p. 50.)

There is not a word in this pleading negativing the competency or disinterestedness of appellant's appraiser, nor is there a specification of any facts whatsoever. The pleading is indeed more general and indefinite than the authorities hold are insufficient because not sufficiently specific.

We quote some of the authorities which state the rules applicable:

"It is not enough to allege generally that the arbitrator was guilty of fraud, partiality, or misconduct; that he failed to pursue his authority, or was the result of a mistake."

5 *C. J.* 203;

Pope Const. Co. v. State Highway Com., 92 S. W. (2d) 974, 977.

"A party seeking equitable relief against an award has the burden of specifically pleading in his bill or complaint sufficient matters or grounds to impeach the award or justify the granting of relief, and no other matters or grounds will be considered. Mere general allegations of fraud,

partiality or corruption, or mistake, or accident are not sufficient; but the particular facts relied on must be stated."

6 *C. J. S.* 258.

"A party objecting to an award or moving to vacate or set the same aside must affirmatively allege or state sufficient and proper available grounds or reasons to justify the interposition of the court; and all grounds or reasons intended to be relied upon should be presented, as none other than those alleged or stated will be considered. In setting forth his grounds or objections the party must specifically state the facts on which they are based, for mere general allegations are insufficient. Particularly is it insufficient to allege generally that the arbitrator was guilty of fraud, partiality or misconduct."

6 *C. J. S.* 261.

"It is plain that general allegations of fraud, and likewise of bias and prejudice without stating definite acts which constitute a fraud or bias or prejudice, are not enough to require judicial inquiry."

Second Soc. of Universalists v. Royal Ins. Co., 109 N. E. 384, 387.

Although the foregoing authorities are in instances attempting to set aside an award, no distinction in principle can be shown from a situation where it is claimed no award has been made because of some fault of the appraiser.

Therefore, considering these authorities, and established principles of pleading, the answer raised no is-

sue upon the disinterestedness of appellant's appraiser, and it is most serious error to make any decision against appellant based on this ground.

4. Appraisal was waived by the appointment by defendants of an appraiser known by them not to be disinterested.

Reference to the terms of the policy provision for appraisal shows that before there was any obligation upon appellant to act, defendants were required to appoint a "competent and disinterested appraiser."

If defendants failed to appoint a disinterested appraiser, they could not defend upon the ground of appellant's failure in this regard. The law has been stated as follows:

> "When the insurer demands the appraisal, it must in good faith nominate a competent, disinterested person as appraiser, before it can defend upon the ground that the insured has failed to keep that part of his contract. Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422; Broch v. Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67. Having once waived the appraisal by its conduct, the insurer cannot require that the matter in dispute be again submitted to arbitration."
>
> *Continental Ins. Co. v. Vallindingham,* 76 S. W. 22, 24 (Ky.).

> "Where fire policy required appointment, in case of disagreement, of two disinterested appraisers who should choose a third, such clause being for the benefit of the insurer, it waived such benefit by appointing an appraiser, who was not disinterested, but was in its employment, and it

was no defense that the insured also appointed an interested appraiser." (Headnote.)

Delaware Underwriters v. Brock, 206 S. W. 377 (Tex.).

By the only evidence bearing on his qualifications in this case (V. III, pp. 1284-5) it appears that defendants' appraiser was a professional adjuster working entirely for insurance companies, and was therefore not a disinterested appraiser within the terms of the policy. This evidence was in a letter from Colbert to Maris, in which the following was stated:

> "I have only recently learned that you are an insurance adjuster, *entirely in the employ of the insurance companies and have been so for many years*—in view of this fact any fair-minded person would decide that the failure to appraise could not be and in fact was not, attributable to the writer." (V. III, pp. 1284-5.) (Italics ours.)

This statement of the employment of defendants' appraiser has never been denied, or in any wise contradicted, though the letter was placed in evidence early in the trial and defendants had ample opportunity to call Maris or produce other contrary evidence if it was not true.

The law in this regard seems well settled by a number of authorities.

Under a provision for appraisement identical with that in the policies here involved, it was held in the case of *Coon v. National Fire Ins. Co.,* 213 N. Y. S. 407, that a professional appraiser for insurance com-

panies designated by the company to act as appraiser was not disinterested, and an award was set aside.

In the case of *Hartford Fire Ins. Co. v. Asher,* 100 S. W. 233, 234, the Court of Appeals of Kentucky stated:

> "It has been well said that an habitual appraiser is not a disinterested person, within the meaning of the arbitration clause in insurance policies."

Other authorities indicating similar views are:

Bradshaw v. Agr. Ins. Co., 32 N. E. 1055 (N. Y.);

National Fire Ins. Co. v. Bennett, 137 S. E. 570 (Ga.);

Marshall v. American Alliance Ins. Co., 274 P. 243, 244 (Kan.);

Delaware Underwriters v. Brock, 206 S. W. 377 (Tex.).

It is an inevitable conclusion from the evidence pertaining to Maris, defendants' appraiser, which has never been contradicted, that said appraiser was not disinterested, and by appointing such appraiser defendants waived the clause for its benefit which required the appraisal. Compliance with this provision was required of appellant only after defendants had appointed a disinterested appraiser. This it appears defendants never did.

> "* * * The courts in determining this question of waiver, hold the company to a strict compliance with the specific terms of the contract be-

fore they will so apply the condition as to work a failure to the insured of his right to sue."

Harrison v. German American Fire Ins. Co., 67 Fed. 577, 582.

Finally, upon this point, it should be pointed out that neither the trial Court, nor the majority opinion of this Honorable Court finds that defendants appointed a competent or disinterested appraiser as they were required to do before any obligation in this regard fell upon appellant. The Colbert letter to Maris was written prior to defendants' answer and therefore defendants had knowledge of the claim that their appraiser was not disinterested. The issue as to whether defendants' appraiser was disinterested was made upon defendants' affirmative defense. Defendants were required to allege and prove "a strict compliance with the specific terms of the contract." They realized this and alleged the appointment of a competent and disinterested appraiser. (V. I, p. 50.) This was put in issue by appellant's implied replication. (Equity Rule 31, U.S.C.A. Sec. 723; *Arkansas v. Mississippi,* 250 U.S. 39, 63 L. ed. 832.) There was no finding or proof that defendants had complied, but the only evidence was that they did not comply, but in fact appointed a disqualified appraiser. Under these circumstances the Court should have held that this defense (if properly pleaded) was not sustained and appraisal was waived.

SECOND GROUND FOR REHEARING.

THE COURT ERRED IN HOLDING THAT IN THE ABSENCE OF A FAIR EFFORT ON THE PART OF THE INSURED TO OBTAIN ARBITRATION THE INSURED COULD NOT RECOVER.

The Court in its opinion cites only one California case on the question of arbitration or appraisement, namely, *Old Saucelito L. & D. Co. v. C. U. A. Co.*, 66 Cal. 253, which held that adjustment was a condition precedent to action "and that until such adjustment, or a fair effort on the part of the insured, no cause of action arose." (66 Cal. 253, 258.) Since that case was decided the standard statutory form of fire insurance policy has been adopted, and the Supreme Court of California pursuant to said statute has changed its views that arbitration or appraisement was an absolute condition precedent to action. It is now held by the Supreme Court of California that for appraisal to become a condition precedent to action by the insured, the insurer must show full compliance with the requirements to bring the appraisal into being.

In the case of *Winchester v. North British etc. Co.*, 160 Cal. 1, the Supreme Court of California considered a number of its previous cases concerning the question of appraisal as a condition precedent and held that appraisal was not a condition precedent and was waived by the failure of the insurer to demand appraisal. The appellant in that case cited *Old Saucelito L. & D. Co.*, supra, and other cases claiming that arbitration was "a condition precedent to the right to sue where the insurer and the insured have failed to agree." But the Court refused to sustain this contention and said:

"But even if it is conceded that the opinions in the cases just discussed tend to sustain appellant's position, then we must hold that those cases are to that extent overruled by the later opinion of this court in Bank in Case v. Manufacturers Fire and Marine Ins. Co., 82 Cal. 266." (160 Cal. 7.)

In the case at bar the policies provided:

"If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, *this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name shall appoint a competent and disinterested appraiser.*" (V. I, p. 311.)

We ask this Court to note particularly that before there is any obligation on the insured to act in reference to an appraisement, the insurer must appoint a competent and disinterested appraiser, and if the insurer does not appoint a competent and disinterested appraiser, there is never any obligation on the insured to act in reference to an appraisement.

Hence, the law does not now require the insured to take the initiative as was the case in *Old Saucelito L. & D. Co.,* 66 Cal. 253, but the company for whose benefit the provisions exist can bring the appraisement into being only by a strict compliance with all the necessary requirements on its part, and if the company fails in such strict compliance in any particular, the appraisal

is not required as a condition precedent to action by the insured.

It is the general law that appraisal is not a condition precedent, but is waived where the insurer appoints a partisan appraiser. Thus the rule, supported by many authorities, is stated in a note in 94 *A. L. R.* p. 510, as follows:

> "The insurer also waives appraisal where it seeks an improper advantage by selecting as its appraiser a partisan who is willing and anxiously persistent in serving its interests."

It seems manifest that under the terms of the policies here involved, under the law of California, and under the general law, appraisal was a condition precedent to suit on the policies here in question only after strict compliance by defendants with the terms of the policies.

It has never been proved and never been found by the trial Court or this Honorable Court that defendants appointed a competent and disinterested appraiser. On the contrary it appears in the evidence that he was not disinterested. Therefore, this Court has committed clear and prejudicial error in holding that appraisal or a fair effort on the part of appellant was a condition precedent to litigation by appellant.

THIRD GROUND FOR REHEARING.

THE COURT ERRS IN HOLDING THAT APPELLANT MADE "NO FAIR EFFORT" AT ARBITRATION, BUT FRAUDULENTLY FRUSTRATED ARBITRATION.

That there were gratuities to Colbert from Hyland is true, that Hyland loaned Colbert money is true. It is not true, however, that there were any fictitious contracts, and this claim is against the great weight of the evidence. Colbert's testimony, characterized by the majority opinion as a "confession" was most uncertain and indefinite; it was given to please his employers after he had been kept a prisoner over night and after a threat of criminal prosecution (which threat had nothing to do with his dealings with Hyland). His testimony, under these circumstances, should not be credited against the overwhelming weight of other testimony to the contrary.

There is not any evidence that appellant in any wise attempted to influence his appraiser during the course of attempting to reach an appraisal, there is not any evidence that appellant suggested the name of any prospective umpire, or insisted upon any particular umpire. As stated, the only act of appellant in connection with the appraisal was to appoint Colbert as his appraiser. If there was any fault on his part, it was that Colbert was not "disinterested" within the meaning of the appraisal provision in the policy. However, as is cogently pointed out by the dissenting opinion, this defense was not pleaded, though to be relied upon it must be specifically pleaded.

Hence, the statement of the Honorable Court that appellant made no fair effort to reach an appraisal is,

we respectfully submit, not warranted by the facts in the record.

We submit, moreover, that the evidence shows that Colbert made a fair effort to agree upon an umpire. He suggested the names of a large number of prominent business men and citizens of the community. He was willing to accept one suggested by defendants' appraiser (Mr. E. W. Wilson) but this gentleman declined to act. He invited the defendants' appraiser to suggest the name of any Judge to the Superior Court (V. III, p. 1278), but the defendants' appraiser didn't want any of the Judges. (V. III, p. 1279.) After naming Mr. Logie without first consulting him, Colbert found that Mr. Logie would accept only on certain conditions, one of which amounted to prejudging the case, and rightfully suggested that Mr. Logie decline to act. Although the majority opinion regards this as reprehensible, its view is entirely erroneous for it was entirely proper to eliminate any proposed umpire who had in any wise prejudged the case.

Conrad v. Massasoit Ins. Co. v. Allen (Mass.), 20, 22;
5 *C. J.* 65-6.

The first disqualifying question of any juryman is "Have you formed any opinion on this case?"

The entire record of the dealings between the two appraisers shows that Colbert made strenuous efforts to get an umpire appointed and the failure to reach an agreement can more readily be attributable to defendants' appraiser than to Colbert. (V. III, pp. 1265-1286.) Why should not defendants' appraiser be will-

ing to take some one of the sixteen judges of the Superior Court in San Francisco?

Attributing to appellant the acts of his appraiser, it appears that the majority opinion is entirely in error in concluding that appellant made no "fair effort" to reach an appraisal. On the other hand the defendants' appraiser, by his absence for several weeks, by his refusal to accept any of the many competent and disinterested men suggested to him as umpire (except one who had prejudged the matter), may be said to be responsible for the failure of appraisal.

FOURTH GROUND FOR REHEARING.

THE COURT ERRED IN HOLDING THAT PLAINTIFF WAS GUILTY OF FRAUD OR FALSE SWEARING WHEN HE SWORE TO HIS PROOFS OF LOSS.

The Honorable Court in its majority opinion argues and finds that the claim of out-of-sight loss of over $15,000.00 in the proof of loss was materially overstated, and then, after correctly holding that overvaluation itself does not avoid a claim for fraud or false swearing, proceeds to hold that fraud may be inferred from the overvaluation and certain other stated matters.

This holding of the Court is in error for several reasons:

A. In so holding the Honorable Court has overlooked and failed to follow the well established rule, both in law and equity, that fraud is never presumed, but must be affirmatively proved.

The rule supported by a multitude of cases is stated in 12 *Cal. Juris.*, p. 816, as follows:

> "Fraud is odious and is never presumed; it must be established by proof. The presumption always is in favor of fair dealing, except, perhaps where confidential relations are involved. This presumption has been said to approximate in strength that of innocence of crime. The burden of proving fraud, therefore, rests upon the person asserting it."

> "The evidence of these matters, facts, and circumstances taken together must amount to proof of fraud, and not to a mere suspicion thereof, for the presumption of the law, except where confidential relations are involved, is always in favor of the fair dealing of the parties."

Levy v. Scott, 115 Cal. 39, 42.

> "If there be two inferences equally reasonable and equally susceptible of being drawn from the proven facts, the one favoring fair dealing and the other corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing. For fraud must always be proved, so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence, and it becomes the duty of Court or jury, as has been said, to find in favor of innocence and uprightness."

Original M. & M. Co. v. San Joaquin, etc. Corp., 220 Cal. 152, 165.

The principles stated in these authorities, which could be greatly multiplied, have been entirely ignored by this Honorable Court and exactly opposite principles have been applied. The Court presumes conspiracy; it infers fraud and wrongdoing from facts which comport better with fair dealing, and it does these things, not to favor some equitable right, but to enforce a forfeiture which is also abhorrent to equity. In failing to apply these principles in favor of appellant, the majority opinion of this Court has fallen into most serious error.

B. The Honorable Court is in error in holding that any fraud or false swearing can be inferred from the facts stated in its opinion.

As stated by the majority opinion "mere over-valuation does not avoid a claim". Consequently even if over-valuation existed, nothing more appearing, no inference or presumption of fraud arises. Therefore, if it be taken as established that over-valuation existed, this raises no inference of fraud.

The next statement appearing in the majority opinion is that appellant was presumably familiar with his own business.

That appellant was not in personal charge of his factory, and had not been in charge thereof for a long time prior to the fire, is a fact which the testimony shows without any contradicting fact or circumstance. Appellant maintained offices elsewhere, and if he had been in personal charge of his factory, or had visited it frequently, this would have been easy for defendants to establish. Hence any presumption of personal

familiarity with his factory and knowledge of conditions there at the time of the fire is entirely eliminated and cannot be the basis for any inference of fraud.

The next fact stated is that appellant was familiar with the system of maintaining records and that it is reasonable to assume that he knew what the general ledger and so-called perpetual inventory showed as to the amount of goods in his factory at the date of the fire. If we assume all this to be true, nevertheless no inference of fraud or false swearing arises therefrom. Of course, appellant was familiar with the forms used in his business, and it is possible he was told what the general ledger and stock sheets or so-called perpetual inventory showed was on hand at the time. However, the Court should note that Mr. Terkelson, a witness called by appellees, testified that after the fire he kept inquiring what the values were, and no one knew, and that on October 21st following the fire, he was told the values might run around $130,000.00. (V. VI, p. 2970.) Mr. Smith, adjuster for defendants, testified that he had no confidence in perpetual inventories, and from his experience they were unreliable. (V. V, pp. 2785-6.) Mr. Taylor, appellant's bookkeeper testified that a physical count of merchandise always showed more material on hand than the stock sheets showed, running into very large figures. (V. III, p. 1365.) Some material was burned up as was claimed by appellant. When appellant's bookkeeper states that his accounts always showed less than the true amount of merchandise on hand, and defendants' adjuster stated he had no confidence in such records, was not appellant justified in attempting to arrive at more accurate figures by

calling in certified public accountants; and after he had called in such accountants and they had arrived at an estimate of his loss, was he not justified in presenting their estimate as a basis of his claim without being subjected to a charge of false swearing? That this Court, or any other Court may find, after hearing all the evidence, that there was not actually as much material on hand as that estimate showed, does not give the slightest basis for any inference that the claim was not presented in good faith.

The Court next argues that it is very strange that appellant should content himself with the projected apparent inventory without research or investigation on his own part. Appellant's response was that he was not an accountant any more than the attorney questioning him was his own stenographer. He didn't keep the books of his business any more than the judges keep the records of their court, and when he called upon experts to inform him what should have been on hand, he relied upon their reports. Bank directors and officials of large corporations are constantly called upon to verify reports of which it is impossible to have personal knowledge and for the accuracy of which they must depend upon accountants.

What would an independent investigation have shown appellant? No matter what he did it would ultimately have come back to a question of accounting, and with appellant's own accountant stating that his records always showed less than what was on hand, he had to adopt some plan.

The Honorable Court criticizes appellant for taking the Hood & Strong projected apparent inventory based

upon the annual inventory of December 31, 1928, instead of claiming on the Ernst & Ernst inventory of May 31, 1929. Does the Court overlook the fact that a complete calculation was later made upon the basis of the Ernst & Ernst inventory in the hope of getting more accurate figures, and that this resulted in an increase of several thousand dollars in plaintiff's claim as set forth in his amended complaint? Apparently after considering the claim in appellant's proof of loss too large, the Court criticizes appellant for not adopting a basis which would have made it much larger.

It seems appropriate at this point to point out that in the course of the trial, in an effort to ascertain what was fairly due him, appellant requested the Court to appoint independent accountants to go over his books. Defendants strenuously resisted. The trial judge first decided to make such appointment, and then changed his mind, and the appointment was never made. (V. III, pp. 1296-7; V. III, pp. 1590-91.)

The Court refers to the statement of appellant that he handled all the large purchases, made notations from reports which he knew to be correct from personal investigation, and then the Court quotes a statement "I was familiar with the value on October 19, 1929, and I am today". The word "value" in this statement is used in the sense of "price" and not in the sense of total valuation. Any other implication of the word except "price" leads to a misunderstanding and misinterpretation of the particular testimony. (V. I, p. 526.)

Considering each of these statements in their correct meaning, there is nothing therein from which any inference is possible that the appellant's claim was fraudulently exaggerated.

The Court next quotes a statement from the testimony of R. V. Smith about grades and prices wherein he said he told Hyland "If you set up incorrect grades, or incorrect quantities, or incorrect prices and swear that those are the correct prices, you will vitiate your policy contract, and by the terms of the contract you might lose all your insurance."

Suppose such conversation took place, does it lead to any inference of fraud or false swearing? Does it indicate that appellant did not honestly believe he had what was set forth in his proof of loss? There is no basis for any inference against appellant from this testimony.

Moreover, as we fully pointed out in appellant's reply brief, pages 81 to 83, the only overgrading or overpricing claimed was in the Radford Inventory of Merchandise remaining after the fire, and we have there demonstrated mathematically beyond the possibility of controversy, that any overpricing and overgrading was beneficial to defendants and would actually decrease appellant's loss.

There is an entire *non sequitur* in the majority opinion in the statement that because there is evidence that Hyland was well acquainted with pricing and grading the salvaged merchandise and personally participated in making up and presenting the proofs of

loss, this is very persuasive against the theory that on his out of sight loss he would innocently and without investigation take the overstated report of his accountant as correct.

If Hyland knew every price and grade and personally prepared the proof of loss, still his out of sight loss was a problem in accounting and for which he had to rely upon competent accountants. The very term itself—out of sight loss—indicates that it is a loss which is incapable of inspection, study, actual investigation, or accurate measurement, and can only be estimated by accounting methods. It was obvious to appellant that there was an out of sight loss, the trial Court so found, and this Court confirms it. Was there any other way of arriving at the amount of this loss besides having accountants attempt to establish what should have been there at the time of the fire, deduct what was actually left, and claim the difference as out of sight loss? This was exactly what Hyland did, and this Court and no one else has yet suggested a better method. Hence we say that there is neither law nor logic in any inference against appellant from any evidence of his participation in preparing the proof of loss or his knowledge of grading or pricing the salvaged merchandise.

Finally the Honorable Court states that Hyland's credibility is seriously weakened by the disclosure with reference to the fictitious Newhall contracts and by his statement that he had no knowledge or belief as to the origin of the fire. We have repeatedly pointed out

that any finding of fictitious Newhall contracts is against the great weight of the evidence, and that such claimed contracts were not the basis of or part of or material to any claim of loss in this case, and it does not appear that they were material to any claim of loss or part of any claim of loss in any other case.

As to the statement that appellant stated to the insurance companies in his proof of loss that he had no knowledge or belief as to the origin of the fire, we point out that this Honorable Court in its majority opinion is in error in assuming such statement was made. Appellant's statement to the companies was:

> "A fire occurred * * * which originated from cause unknown to this assured." (V. I, p. 418.)

Under the law of California appellant was not required to state his opinion or belief as to the origin of the fire (Civil Code Sec. 2570 at that time) and appellant made no statement in his proof of loss that he had no opinion or belief. That evidence and opinions may have been presented to appellant as to the origin of the fire was not knowledge on his part, and hence his statement was exactly true.

Accordingly we respectfully submit that the majority opinion is in error in its assumption that appellant stated in his proof of loss that he had no knowledge or belief as to the origin of the fire.

The statement appellant actually made was exactly true, and consequently this Court is entirely in error in holding that appellant's credibility was in any wise affected thereby.

In the foregoing we have discussed every matter stated by this Court as supporting the inference that the trial Court was justified in finding there was false swearing in the proof of loss. We ask this Honorable Court to reconsider these matters in the light of the situation in which appellant found himself following the fire.

Would not any member of this Court have employed expert accountants and obtained the best information possible from his books and filed his proof of loss on this report? There is no suggestion anywhere in the record from any accountant otherwise than that appellant sought the most accurate information possible.

FIFTH GROUND FOR REHEARING.

THE COURT ERRED IN FAILING TO CONSIDER THE POINT THAT ANY DEFENSE OF FALSE SWEARING IN PROOF OF LOSS WAS WAIVED BY APPELLEES.

The proofs of loss in this case were presented on December 24, and 26, 1929. (V. I, p. 395.) Thereafter, for many months the defendants dealt with plaintiff without even hinting at a claim of false swearing. In the meantime thousands of dollars expense was incurred by appellant in moving, storing and handling and finally auctioning at defendants' suggestion the salvaged merchandise; loss was also sustained by decline in prices during this period. Some of this expense and loss could have been saved if false swearing had been asserted and liability denied for the loss. Moreover, the representative of the insurance com-

panies reached the scene of fire before plaintiff. (V. IV, pp. 1926-7.) From that time on, the defendant insurance companies through their representatives the fire patrol and their adjusters were constantly on the job. (V. V, p. 2617.) The adjuster told Mr. Hyland what he should do and that an estimate of the loss was required. "I told him it was not necessary for that to be accurate". (Testimony of R. V. Smith, V. V, p. 2627.)

The adjuster Smith testified that the Hood & Strong report was furnished him prior to the proof of loss about the middle of December, 1929; that he didn't attach any great importance to it. "I simply noticed the method used in arriving at what appeared to be an inventory. It was no help or benefit to me." (V. V, p. 2752.)

This was the report on which the proof of loss was based.

The defendant companies and their adjusters in disagreeing with the proof of loss claimed there was nothing burned out of sight. Yet there is not one suggestion in the evidence that subsequent to the filing of the proofs of loss and prior to filing the answers, any one ever hinted at or claimed that there was any false swearing in the proofs of loss or a forfeiture by reason of the claim of out of sight loss, or for any other reason.

Under all the circumstances of this case, considering the damaging delay to plaintiff during which there was no claim of non-liability or forfeiture by reason of false swearing, it should have been held in the

trial Court that any claim of false swearing was waived. In failing to consider this point presented both in appellant's brief, pages 34-37, and in appellant's reply brief, page 100, this Honorable Court has committed error.

The recent case of *Young v. California Insurance Co.*, 46 Pac. (2d) 718, 722 (Idaho 1936), holds that any defense of false swearing was waived where no objection on this ground was made prior to answer. The language of the Court was as follows:

> "Appellant's nowhere, if we correctly read the correspondence, based their non-liability, and so notified respondent, upon false and fraudulent statements made in the proofs of loss, but upon other grounds, and first urged their nonliability, predicated upon fraud and false swearing in the proofs of loss, in their answer in this action. In such circumstances appellants are not permitted to avail themselves of the defense of fraud or false swearing, the rule being that only specified defects can be relied upon as a defense and others not specified are waived.
>
> 'An insurer, by specifying a certain or particular defect or defects in proofs of loss, waives all other defects therein. And since a requirement that notice of loss be given is for the purpose of enabling the insurer promptly to investigate, such notice is waived where the insurer sends its local agent and adjuster to examine the property, and later objects to the proofs of loss as furnished, but does not mention the fact that the notice was oral, and not written as required by the policy * * * The rule that only specified defects can be relied on as a defense, and others

not specified are waived, also applies where insurer notifies insured that it refuses settlement for noncompliance with the contract time for filing proofs, and other reasons. * * *' 7 Couch, Cyclopedia of Insurance Law, Sec. 1593, p. 5593.

'If an insurer requires or receives proofs of loss, and subsequently requires the claimant to furnish additional proofs, or to amend the proofs already filed, or to perform some similar act, and at the time has knowledge of breaches of any of the conditions of the policy, or of any other cause, such as misrepresentation, etc., which might be a defense to an action on the policy, and remains silent as to such defense, a waiver is effected, and the insurer is estopped from setting up such breach of condition, or other cause preventing recovery. Thus, the act of a grand recorder of a lodge, after, and with knowledge of, a forfeiture arising from the insured having engaged in a prohibited occupation, in requesting further special proofs of loss, effects a waiver of the forfeiture. So, if an insurer recognizes the continued existence of a contract by requiring proofs of claim, which are furnished at some trouble and expense, it waives any right to take advantage of any previously known grounds for forfeiture. And a requirement of immediate notice of loss is waived by requesting additional proofs, the furnishing of which involves considerable trouble and expense. In order to constitute a waiver in such cases, however, it must appear that the company had knowledge of such defenses at the time of requiring the additional proof. And the parties may validly contract that a demand for proofs or for additional proofs, shall not effect a waiver,

and when it is so provided, calling for additional proofs does not waive a defense of delay or misrepresentations.' 7 Couch Cyclopedia of Insurance Law, Sec. 1596, p. 5597."

Young v. Calif. Ins. Co., 46 Pac. (2d) 718, 722 (Ida.).

"Whether in this case there was false swearing upon the part of plaintiff was conclusively sealed by the verdict of the jury, though, commingled with that consideration was the other, that the jurors were told to disregard any matters pertaining to false swearing in the proofs of loss, if they believed defendant was in full possession of all the facts and circumstances relating to the fire at the time plaintiff received the Dimich letter.

On this point Mr. Chief Justice Moore, in Wyatt v. Henderson, 31 Or. 48, 48 Pac. 790, credits Mr. Justice Swayne in Railway Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693, as saying: 'Where a party gives a reason for his conduct and decision touching anything in action in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law'.

We see no reason to depart from this rule which is securely rooted in common justice and plainly applicable to the case at bar. After the lapse of some months subsequent to the fire, defendant expressed its declination to meet the terms of the contract of insurance upon the sole ground that certain acts of the plaintiff had in-

creased the hazard of its risk. Accepting this position of defendant's as the battle ground, plaintiff employed counsel and initiated this action. By this conduct, defendant led plaintiff to believe that there was but one reason for its denial of liability; consequently under such circumstances, defendant should not be permitted to screen itself from liability on grounds other than the one specified in the letter indited by its legal representative, provided defendant had informed itself prior to the letter of the cause of the fire, and was in possession of the material which it now claims exculpates it from liability. 'Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire frankness. They may refuse to pay without specifying any ground, and insist upon any available ground, but, when they plant themselves upon a separate defense and so notify the insured, they should not be permitted to retract if the latter has acted upon their position as announced, and incurred expense in consequence of it,' said Mr. Chief Justice Church speaking for the Court of Appeals in Brink et al. v. Insurance Co., 80 N. Y. 108, and quoted with approval in McCormick v. Ins. Co., 163 Pa. 193, 29 Atl. 747."

Ward v. Queen City Fire Ins. Co., 138 Pac. 1067, 1068 (Ore.).

"If the Company, after knowledge of the breach, enters into negotiations or transactions with the assured, which recognizes and treats the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as

having waived the right to claim a forfeiture. To the same effect is Ins. Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689."

Georgia Home Ins. Co. v. Allen, 30 S. 537, 539.

In the U. S. Supreme Court case referred to, that Court in upholding the waiver of a forfeiture stated:

"Forfeitures are not favored in the law. They are often the means of great oppression and injustice, and where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made."

Ins. Co. v. Norton, 96 U. S. 234, 242, 24 L. Ed. 689, 692.

Slight evidence of a waiver of a forfeiture is sufficient.

"Since the law favors the waiver of forfeiture, the amount of evidence necessary to establish such a waiver is less than that needed to establish a forfeiture. Waiver may be shown by *parol,* and by circumstances or a course of acts or conduct, proof of express language being unnecessary."

25 *Cal. Juris.* p. 932.

"It follows from the fact that forfeitures are abhorred that a waiver of forfeiture is favored and requires less evidence to establish than is required to establish a forfeiture. Indeed, it has been held that slight evidence of waiver is sufficient."

12 *Cal. Juris.* p. 642.

Considering the many months of negotiations, the sale of the salvaged merchandise consented to by de-

fendants, the expenses heaped upon plaintiff, and the failure to assert any false swearing prior to the filing of the answer, it should be held in this case that any cause of forfeiture, if any existed, by reason of false swearing in the proof of loss, was waived.

This Honorable Court in its majority opinion has erred by failing to consider this point.

SIXTH GROUND FOR REHEARING.

THE MAJORITY OPINION IS IN ERROR IN HOLDING THAT FRAUD OR FALSE SWEARING COULD BE BASED UPON CLAIM OF OUT OF SIGHT LOSS SET FORTH IN THE PROOF OF LOSS.

The claim of out of sight loss set forth in the proof of loss, and as appeared therein was an accountant's estimate. This estimate was the Hood & Strong report of November, 1929. (Pfs. Exhibit I, V. I, pp. 246-248.) This report itself shows that it was not based upon an audit. (V. I, p. 246.) It was presented to defendants' adjuster prior to the filing of the proof of loss. (V. V, p. 2751.) He stated that it was of no help or benefit to him. (V. V, p. 2752.)

The proof of loss had attached to it this Hood & Strong report and the proof of loss showed that it was based upon this report, the proof stating:

> "Merchandise value on hand 10/19/29 as per Hood & Strong report attached, $102,453.23." (V. I, p. 423.)

The Hood & Strong report showed exactly how the figures were arrived at. (V. I, pp. 246-8.)

This Honorable Court has entirely overlooked the fact that a proof of loss of this character is not calculated to deceive, could not deceive, did not tend in any wise to mislead defendants, and purported only to represent information furnished to appellant. Appellant in effect stated: "Hood & Strong have made a report to me which I hand you herewith as the basis of my claim. The method of arriving at an estimate of my loss and the calculations are fully shown".

We submit that such proof of loss which correctly represented information furnished appellant, and was made solely upon information furnished to appellant by accountants whose integrity has never been questioned, and whose fairness is conceded by accountant for defendants, cannot legally be the basis for a charge of false swearing.

> "Fraud and false swearing imply something more than some mistake of fact or honest misstatements on the part of the assured. They consist in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true, which the party does not know to be true, and which he has no reasonable ground for believing to be true."
>
> *Atherton v. British Am. Assur. Co.*, 30 A. 1006 (Me.).
>
> "Was there false swearing in the proof of loss as to the amount of goods on hand at the time of the fire?
>
> This question must be answered in the negative.
>
> The rule of law on this subject is well settled, and is to the effect that such false swearing, to

forfeit an insurance policy, must consist in an oath to statements knowingly and willfully false, or recklessly made."

Va. Fire & Marine Ins. Co. v. Hogue, 54 S. E. 8;

North British Ins. Co. v. Nidiffer, 72 S. E. 103, Ann. Case 1916A 464.

"The proof of loss was based on statements made out by Weiss, the expert accountant first employed by the assured. There were mistakes therein, but, as shown by the evidence, as above indicated, they were honest mistakes, not misstatements of fact designedly made. They were honestly believed by the assured to be correct at the time the proof of loss was sent to the insurance company."

Lavenstein Bros. v. Hartford, Fire Ins. Co., 99 S. E. 579, 588 (Va.).

In the case of *Helbing v. Svea Ins. Co.,* 54 Cal. 156, 159, the Supreme Court of California stated upon a claim of false swearing:

"It is true that soon after the fire the assured submitted their claim wherein they alleged the aggregate of their losses to be over $4500.00, but the claim was accompanied by an *exhibit* from which it appeared that their estimate was based upon the amount of bills for goods purchased during the period of several months prior to the fire, less the amount of cash sales during the same period. It would not have been credible that the defendant could have been deceived by such a statement and exhibit, and it appears affirmatively that its agents were not deceived."

See, also,

Maher v. Hibernia Ins. Co., 67 N. Y. 283, 292.

With some of his property burned up, making it necessary to rely upon accountants, appellant's proof of loss was reasonably founded; it was a true representation of the accountant's reports to appellant; it could not deceive and could not constitute false swearing, and consequently the majority opinion is in error in sustaining a finding of false swearing thereon.

SEVENTH GROUND FOR REHEARING.

THE COURT HAS ERRED IN SUSTAINING THE JUDGMENT OF THE TRIAL COURT UPON CLAIM OF FALSE SWEARING WHICH WAS NOT PLEADED.

So far as the proofs of loss were concerned, the defendants pleaded false swearing (except as to origin of the fire) *only* as follows:

> "Plaintiff claimed that the loss sustained by reason of the fire * * * was and is the sum of $73,601.96 * * * whereas in truth and in fact the loss sustained by said plaintiff by reason of said fire did not exceed the sum of * * * $35,000.00, which fact plaintiff well knew at the time of preparing and verifying said purported proofs of loss."
>
> (V. I, pp. 43-44.)

This Honorable Court has not found, nor did the trial Court find that appellant knew his loss did not exceed $35,000.00. It would be impossible to reasonably make such finding in view of defendants' offer

of adjustment in the sum of $55,000.00 made by defendants and refused by appellant, and which appellant offered to prove in the trial Court. (V. VI, p. 2975.)

It is thus apparent from their pleadings that defendants did not claim that the item of $15,645.25 in appellant's proof of loss, according to the calculation based upon the Hood & Strong report was false or fraudulent, otherwise they would have specified this item. And since defendants did not charge fraud or false swearing in their answers by reason of this claim of out of sight loss, it was error for the trial Court or for this Honorable Court to find fraud or false swearing based upon this claim.

No rule of pleading is better known than that a charge of fraud must be specifically made.

> "One against whom charges of fraud are made is entitled to specific averments of the acts of which he is accused."
>
> 12 *Cal. Jur.* 800-801.

> "It is not, therefore, sufficient to allege fraud in general terms."
>
> 12 *Cal. Jur.* 802.

> "It is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions."
>
> *Hannon v. Madden,* 214 Cal. 251, 267;
>
> *Vanderwort v. Farmers etc. Nat. Bank,* 7 Cal. (2d) 28, 30.

The fraud or false swearing relied upon must be pleaded even though the defendant first becomes aware of the facts at the trial. It was so held in *Solem v. Connecticut Fire Ins. Co.,* 109 Pac. 432, 434 (Mont.), where the Court holding that the trial Court properly refused an instruction on false swearing which was not pleaded, though evidence thereof appeared at the trial, stated the following:

> "* * * The well-nigh universal rule is that to avail itself of such a defense, the defendant must have specially pleaded it. 11 Ency. of Pl. & Prac. 422, Geiss v. State Inv. & Ins. Co., 98 Cal. 241. And the reason for the rule is apparent. The provision of the policy quoted above (fraud and false swearing) is for the exclusive benefit of the insurance company and may be waived by it. 8 Current Law 430 and the cases cited. Being for the specific benefit of the company, it will be deemed to have been waived unless pleaded."

> "Fraud or false swearing is an affirmative defense which must be specially pleaded."
> 26 *C. J.* 499.

We respectfully point out therefore, that defendants did not plead any fraud or false swearing by reason of the claim of out of sight loss in the proof of loss, and by their failure to plead any fraud or false swearing in respect to this matter, it must be deemed by this Court that they elected not to rely upon such defense, and waived it. Hence it was and is error for this Honorable Court to sustain the judgment against appellant upon a defense which defendants chose not to plead.

EIGHTH GROUND FOR REHEARING.

THE COURT ERRED IN FAILING TO CONSIDER THE POINT MADE BY APPELLANT THAT THE MEMORANDUM OPINION OF THE TRIAL COURT DID NOT COMPLY WITH EQUITY RULE NO. 70½.

The first error set forth by appellant on this appeal was the error of the trial Court in failing to comply with Equity Rule 70½ which requires the Court of first instance to "find the facts specially and state separately its conclusions of law therein". This rule has the force and effect of law.

The error of the trial Court in failing to follow this rule is discussed in appellant's brief, pages 8-18. It is there shown that the opinion of the trial Court adopted as its findings of fact and conclusions of law wholly fails to comply even in substance with the rule. The opinion is argumentative, discursive and indefinite, it finds facts not in issue, and failed to find on the principal issue in the case.

We believe that the failure of the trial Court to make proper findings, but instead to set forth an argumentative opinion, has led this Honorable Court into error to the great injury of appellant.

Certainly this Honorable Court in its opinion in the decision of this case has entirely failed to consider the error of the trial Court in failing to comply with Equity Rule 70½.

We refrain from repeating the argument heretofore made on this point and ask the Court to refer to appellant's brief, pages 8-18, for the discussion of this error by the trial Court and the law applicable. We

further ask this Court to now consider the error and because of the prejudice that has resulted to appellant by reason of the disregard of this rule, to grant a rehearing and reverse the judgment herein.

NINTH GROUND FOR REHEARING.

THE MAJORITY OPINION IS IN ERROR IN FAILING TO CONSIDER ALL THE EVIDENCE IN THE CASE, BUT HAS CONSIDERED ONLY THE EVIDENCE FAVORABLE TO APPELLEES.

The able dissenting opinion expresses in strong and concise language the error into which the majority has fallen, which is to seek out evidence in the record to sustain the judgment of the Court below, instead of considering the whole record and trying the case *de novo*. Because we are unable to express this matter as well as it is expressed in the dissenting opinion herein, we quote the following from it:

> "The majority has pointed out certain evidence in favor of appellees, and without relating any of the evidence in favor of appellant, or making any statement indicating that it considered it, concludes: 'This constitutes sufficient evidence to support the finding'. It is quite apparent that the majority has treated the case as an action at law, in which our duty is to ascertain whether or not there is any substantial evidence to support the findings. However, this is a suit in equity. As said in Aro Equipment Corporation v. Herring-Wisler Co. (CCA 8), 84 F. (2d) 619, 621:
>
> '* * * An appeal in equity brings before the appellate court the whole record, and the court

> is required to examine the record and try the case de novo. The findings of the trial court, while entitled to great weight, may be adopted or discarded by the appellate court, even though supported by substantial evidence.'

This is the rule which has formerly prevailed in this court (Presidio Mining Co. v. Overton (CCA 9), 270 Fed. 388, 389 et seq.; Title Guarantee & Trust Co. v. United States (CCA 9), 50 F. (2d) 544, 546), and it has been universally followed in other circuits. A few of the cases are: New York Life Ins. Co. v. Simons (CCA 1), 60 F. (2d) 30, 32 (cert. den. 287 U. S. 648); Victor Talking Machine Co. v. George (CCA 3); 69 F. (2d) 871, 877 (reversed on other grounds, 293 U. S. 377); Holmes v. Cummings (CCA 5), 71 F. (2d) 364, 365; Laursen v. Lowe (CCA 6), 46 F. (2d) 303, 304; Undergraff v. United Fuel Gas Co. (CCA 6), 67 F. (2d) 431; Equitable Life Assur. Soc. v. Vaughn (CCA 6), 82 F. (2d) 978, 979; Johnson v. Umsted (CCA 8), 64 F. (2d) 316, 318; Elliott v. Gordon (CCA 10), 70 F. (2d) 9.

In accordance with these cases we are required to weigh the evidence, along with the presumption of correctness attending the chancellor's findings. If, however, the chancellor has made a serious mistake of fact or law, the presumption disappears. Such mistake may be the consideration of evidence wrongfully admitted, an application of erroneous law in finding the fact, or in erroneously weighing the evidence as shown in New York Life Ins. Co. v. Simons (CCA 1), supra, 32. It was there said:

> 'For an appellate court to hold that a finding of fact by a sitting justice in an equity case is

clearly wrong it is not necessary that there shall be no substantial evidence to support it; but, if it clearly appears to the appellate court that the great weight of the evidence is clearly contrary to the factual finding of the sitting justice, or the inference of the sitting justice from proven facts is unreasonable, then his finding may be disregarded, and the appellate court determine the facts from the evidence before it, or may draw different conclusions from the facts found."

I believe sufficient has been said to show that the majority has acted on an unsound basis in its decision of the case."

CONCLUSION.

Because the majority opinion herein perpetuates an injustice which damages appellant financially and ruins his character; because the majority opinion has failed to consider substantial matters of fact and established rules of law in appellant's favor; because the majority opinion has failed to apply well founded rules of pleading and fundamental principles of equity in appellant's favor; because the majority opinion has not observed and followed the rules in equity as established by the Supreme Court of the United States, and has not followed the accepted equity practice throughout the United States in considering this case, a rehearing should be granted by this Court.

Therefore, being confident of the willingness and desire of this Court to do justice, appellant respectfully

prays for a rehearing upon all the grounds hereinbefore stated.

Dated, San Francisco,
September 8, 1937.

Respectfully submitted,
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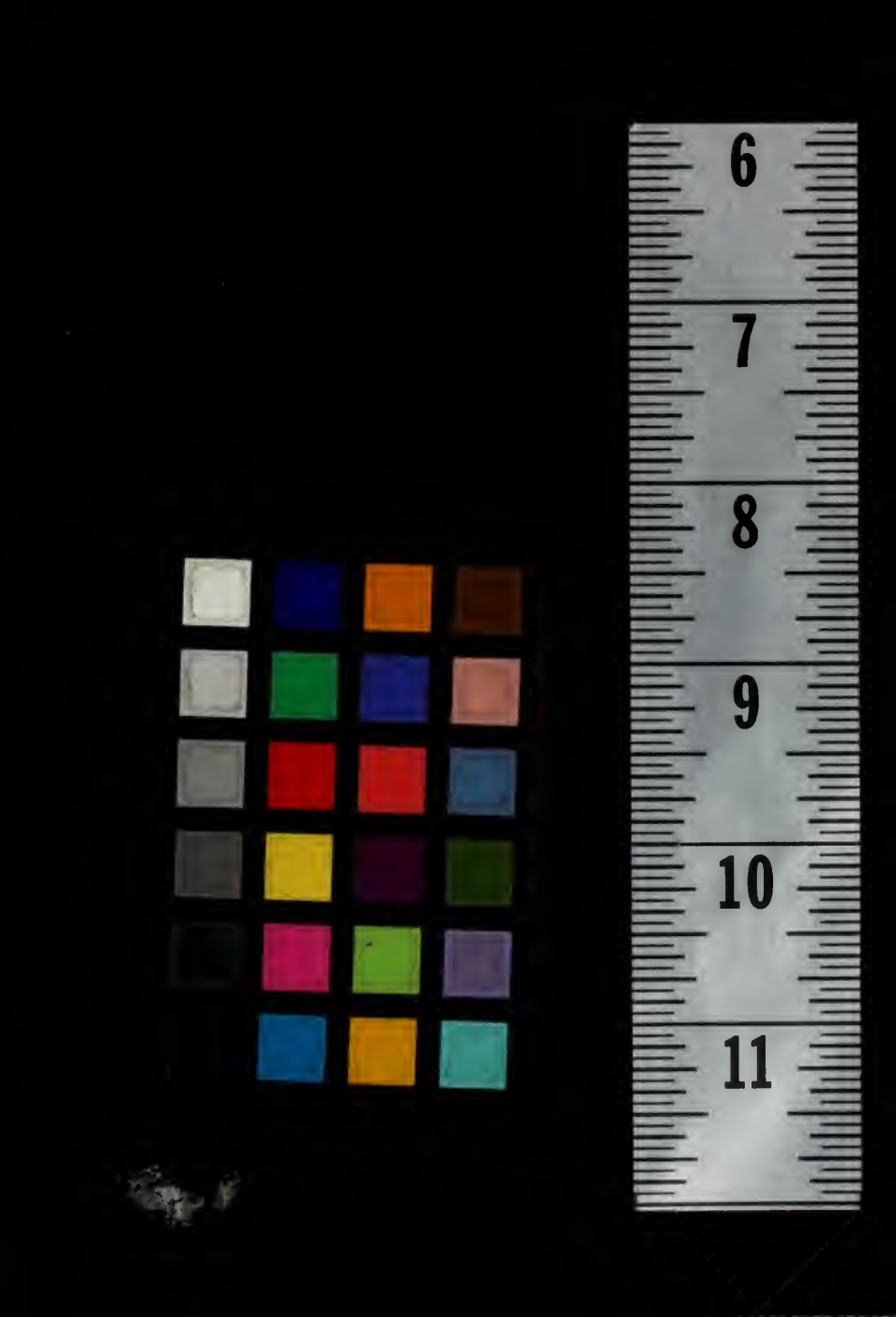
CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
September 8, 1937.

MORGAN V. SPICER,
Of Counsel for Appellant and Petitioner.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